

been our best sources of intelligence about al-Qaida. If we give detainees a legal right to access such information, these foreign governments may simply shut off all further supply of information to the United States. These governments will not want to compromise their evidence or expose the fact that they cooperated with the United States. By exposing our cooperation with these governments, the bill perversely applies a sort of "stop snitching" policy toward our Middle Eastern allies, which is likely to be as effective as when applied to criminal street gangs in the United States.

A final point on this: We already know from hard experience that providing classified and other sensitive information to al-Qaida members is a bad idea. During the 1995 Federal prosecution in New York of the "Blind Sheikh," Omar Rahman, prosecutors turned over the names of 200 unindicted coconspirators to the defense. The prosecutors were required to do so under the civilian criminal justice system of discovery rules, which require that large amounts of evidence be turned over to the defense. The judge warned the defense that the information could only be used to prepare for trial and not for other purposes. Nevertheless, within 10 days of being turned over to the defense, the information found its way to Sudan and into the hands of Osama bin Laden. U.S. District Judge Michael Mukasey, who presided over the case, explained, "That list was in downtown Khartoum within 10 days, and bin Laden was aware within 10 days that the Government was on his trail."

That is what happens when you provide classified information in this context.

In another case tried in the civilian criminal justice system, testimony about the use of cell phones tipped off terrorists as to how the Government was monitoring their networks. According to the judge, "There was a piece of innocuous testimony about the delivery of a battery for a cell phone." This testimony alerted terrorists to Government surveillance and, as a result, their communication network shut down within days and intelligence was lost to the Government forever—intelligence that might have prevented who knows what.

This bill—this particular section of the bill repeats the mistakes of the past. Treating the war with al-Qaida similar to a criminal justice investigation would force the United States to choose between compromising information that could be used to prevent future terrorist attacks and letting captured terrorists go free. This is not a choice that our Nation should be required to make.

I will talk more about some provisions that Senator GRAHAM would like to substitute for these provisions that provide a more fair process for detainees held at Guantanamo Bay—a process that would enable them to have greater

benefit of the use of counsel and of evidence in their CSRT hearings.

I will wait until he actually offers that amendment to get into detail. But the point is, we have bent over backward to provide the detainees at Guantanamo the ability to contest their detention and to have that detention reviewed and eventually have it reviewed in U.S. courts. That is a very fair system, more fair than has ever been provided by any other nation under similar circumstances and more than the Constitution requires. So we are treating the people we captured and are holding at Guantanamo in a very fair way.

What we cannot do is take those same kinds of protections and apply them to anybody we capture in a foreign theater who is held in a foreign theater and therefore is not, under current circumstances—and never has been in the history of warfare—subject to the criminal justice system of our country. To take that system and try to transport it to the fields of Afghanistan or Iraq would obviously be not only a breaking of historical precedent but a very bad idea for all of the reasons I just indicated.

I ask my colleagues to give very careful consideration to the dangerous return to the pre-9/11 notion of terrorism as a law enforcement problem that is inherent in section 1023 of the bill. The terrorists have made no secret that they are actually at war with us, and we ignore this point at our peril.

I conclude by reminding my colleagues that the Statement of Administration Policy on this bill indicates that the President would be advised to veto it if these provisions remained. Therefore, I urge my colleagues, when the opportunity is presented, to join me in striking the provisions of the bill, not only as representing good policy but to help us ensure that at the end of the day, there will be a bill signed by the President called the Defense authorization bill.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I believe I have a half hour to speak in morning business. Prior to doing so, I wish to give a brief rejoinder to my colleague from Arizona on some of the comments he just made.

It is my understanding that the underlying Defense Authorization Act has several provisions that are necessary to address shortcomings in the legal process for individuals detained on the battlefield. One of these provisions limits the use of coerced testimony obtained through cruel, inhumane, or degrading treatment. Such testimony is immoral, and this provision is necessary if we are to obtain and use accurate information.

Another provision provides for reasonable counsel and the ability to present relevant information to detainees who have been held for 2 or more years. This is necessary in a war of undetermined duration.

Finally, the bill does not provide classified information to a detainee. It provides for a summary that is intended to be unclassified to the counsel for detainees.

One of the things that might help is if, on line 16, page 305, subsection II, the word "unclassified" was added before the word "summary" on that line. I believe that is the intent.

#### GUANTANAMO BAY

Mrs. FEINSTEIN. Mr. President, many in this body and people all over the world watched as America, 5½ years ago, began to arrest, apprehend, and incarcerate detainees. Some were real terrorists, some were conspirators, and some were simply in the wrong place at the wrong time. We watched as Camp X-Ray was built at the naval base at Guantanamo, and we have seen the development of a different and lesser standard of American justice developed for proceedings at that base. Since that time, Guantanamo has been derided as a blight on human rights values and as a stain on American justice worldwide.

I believe the time has come to close Guantanamo. An amendment I have filed with Senator HARKIN—Senator HARKIN is my main cosponsor—and Senator HAGEL would do exactly that. It is cosponsored by Senators DODD, CLINTON, BROWN, BINGAMAN, KENNEDY, WHITEHOUSE, OBAMA, DURBIN, BYRD, yourself, Mr. President, Senator SALAZAR, SENATORS FEINGOLD, BOXER, and BIDEN.

It is my understanding that the Republican side has refused us a time agreement, which means we will not be allowed a vote. The amendment is not germane postcloture. So if the Republican side will not allow us a time agreement, we have, unfortunately, no way of getting a vote on this amendment.

The fact is that yesterday's New York Times editorialized that Guantanamo should be closed. That is what many people believe, and yet we cannot fully debate that issue and vote on it here. I think that is truly a shame.

I very much regret this, but Senator HARKIN, Senator HAGEL, and I wish to take some time to address this issue. I assure this body that we will not stop here, but we will find another venue in which to debate and vote on this matter.

The amendment we have proposed would require the President to close the Guantanamo detention facility within 1 year, and it provides the administration flexibility to choose the venue in which to try detainees—in military proceedings, Federal district courts, or both. The administration would choose which maximum security facilities in which to house them.

Why should we close the Guantanamo detention facility? First and foremost, this administration's decision to create Guantanamo appears to have been part of a plan to create a

sphere of limited law outside the scrutiny of American courts that would result in a lesser standard of justice.

Guantanamo is unique. It is not sovereign territory of the United States; however, under a 1903 lease, the United States exercises complete jurisdiction and control over this naval base. I believe the administration hoped to use this distinction to operate without accountability at Guantanamo.

This is revealed in a December 2001 Office of Legal Counsel memo by John Yoo of the Justice Department, who later authored the infamous torture memo. Yoo knew there was a risk that courts would reject the legal theory of unaccountability at Guantanamo, but, just as he did with his torture memo, he laid out the various arguments why his extreme views might prevail.

Let me point this out. In his memo, he says:

Finally, the executive branch has repeatedly taken the position under various statutes that [Guantanamo] is neither part of the United States nor a possession or territory of the United States. For example, this Office [Justice] has opined that [Guantanamo] is not part of the "United States" for purposes of the Immigration and Naturalization Act. . . . Similarly, in 1929, the Attorney General opined that [Guantanamo] was not a "possession" of the United States within the meaning of certain tariff acts.

The memo concludes with this statement:

For the foregoing reasons, we conclude that a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay Naval Base, Cuba. Because the issue has not yet been definitively resolved by the courts, however, we caution that there is some possibility that a district court would entertain such an application.

So here the administration apparently hoped to turn Guantanamo into a legal hybrid wholly under U.S. control but beyond the reach of U.S. courts.

What has happened since then? The Supreme Court rejected the administration's position in *Rasul v. Bush* in a 2004 ruling that American courts do have jurisdiction to hear habeas and other claims from detainees held at Guantanamo.

Following another defeat in the Supreme Court, in *Hamdan v. Rumsfeld* in 2006, which declared invalid the Pentagon's process for adjudicating detainees, the administration responded by pushing the passage of a new Military Commissions Act. This expressly eliminated habeas corpus rights and limited other appeals to procedure and constitutionality, leaving questions of fact or violation of law unresolvable by all Federal courts. This happens nowhere else in American law. But this Military Commissions Act went through.

There are serious questions about whether this provision will withstand a court test. On June 29, just 2 weeks ago, the U.S. Supreme Court agreed to hear two additional cases which go right to this point: *Boumediene v. Bush* and *Al Odah v. the United States*. The High Court declined to hear these cases

in April but has reversed itself and granted certiorari—the first time in 60 years that it agreed to take a case after previously refusing it. From this case, we will find out whether the military commissions law, which prevents full appeals, in fact, can stand the court test.

What is the administration arguing in that case? Once again, they are trying to argue that the Constitution's protection of habeas corpus does not extend to detainees at Guantanamo because it is outside of U.S. jurisdiction.

I believe it is time to put an end to these efforts to use a legal maneuver to create a law-free zone at Guantanamo.

As Justice Kennedy emphasized in his concurring opinion in *Rasul*:

Guantanamo is in every practical respect a United States territory.

So U.S. law would apply at Guantanamo whether this administration likes that or not.

The administration's efforts to create a land without law at Guantanamo has been a moral and a strategic catastrophe for the United States. The bad decision to create a separate system of justice at Guantanamo led to another mistake, and I mentioned this briefly: the Military Commissions Act. In retrospect, let's look at what that act has done:

It expands Presidential authority by giving the White House broad latitude to interpret the meaning and authority of the Geneva Conventions.

It presents vague and ambiguous definitions of torture and cruel and inhumane treatment that fail to establish clear guidelines for what is a permissible interrogation technique.

It abandons the independent judicial review process by establishing a new Court of Military Commission Review with members appointed by the Pentagon. This court has yet to be established.

It limits appeals to the U.S. Court of Appeals for the District of Columbia Circuit, which is given limited review authority. This is what will most likely be before the court very shortly.

For the first time in U.S. history, it allows coerced evidence—obtained prior to December 30, 2005—to be entered into a court record, and it revokes habeas corpus rights that allowed detainees to appeal their status before the Federal court.

Direct review is limited and habeas is eliminated by this military commissions bill.

Clearly, the military commissions bill, which passed by a vote of 65 to 34 in this House, seeks to once again set up a separate and lesser standard of justice.

Senator SPECTER and Senator LEAHY have introduced a bill to restore habeas rights to Guantanamo detainees. I hope that bill is allowed to be presented as an amendment to this bill. It is timely, it is important, and the world is watching. It should happen, and finally, it is the right thing to do.

So what have been all the consequences of this? The detention center

at Guantanamo Bay has become a lightning rod for international condemnation. It draws sharp criticism from our allies and hands our enemies a potent recruiting tool. It weakens our standing in the world and makes the world a more dangerous place for our troops, who may be captured on foreign battlefields in the future.

Yet the administration fails to act, despite public comments from President Bush and top advisers that the facility should be closed. Recent news reports say there is renewed debate inside the White House over closing Guantanamo, but still nothing happens. So I believe it is up to Congress to act.

What would this amendment do? In addition to requiring the President to close Guantanamo within a year, it would prohibit the administration from transferring detainees at Guantanamo to other U.S.-controlled facilities outside the United States. It also requires the President to keep Congress informed of efforts to close the facility and transfer the detainees, and includes the specific requirement that the President report to Congress in writing within 3 months of the bill's enactment.

I believe it is critical that we act. To do nothing, to leave Guantanamo open, as some in the administration would like, is to invite further condemnation and further risk. It will weaken our efforts to fight terrorism and it will continue to erode our standing in the world.

I recently heard Peter Bergen, a terrorism expert, on CNN. I have read his books and listened to him throughout the years. He said he and his colleagues had taken a good look at the increase in terror and he believed it would be fair to assert that our presence in Iraq has served to increase terrorists by sevenfold—by 700 percent over what the world of terrorists was before Iraq and today.

The simple fact remains that Guantanamo violates our values and our traditions, including respect for the rule of law and for human rights.

In avoiding the full weight of American justice, Guantanamo has shocked the conscience of the world. It has led the men and women who have worn the uniform, including many retired flag officers, to speak out. A dozen former generals and admirals warned in January of 2005 that the interrogation techniques allowed at Guantanamo and elsewhere had:

. . . fostered greater animosity toward the United States, undermined our intelligence gathering efforts, and added to the risks facing our troops around the world.

Among those who commented were GEN John Shalikashvili, former Chairman of the Joint Chiefs; GEN Merrill McPeak, former Air Force Chief of Staff; Marine GEN Joseph Hoar, a former commander of the U.S. Central Command; and RADM Dan Guter, a former Navy judge advocate general.

Earlier this year, a very respected retired Marine Corps general, by the

name of James Jones, the former Supreme Allied Commander in Europe, said:

I would close the prison tomorrow. I would do it immediately. Just the images alone have hurt our national reputation. I don't know how you fix that without closing it.

I agree with him. I don't know how you begin to fix the damage brought by Guantanamo without closing it. A military commissions bill couldn't do it. We can't do it, and that is the fact.

Former Secretary of State Colin Powell said it succinctly:

I would close it not tomorrow, but this afternoon.

But importantly, the sense of conscience, as well as a measure of the international reaction to Guantanamo, came in a statement by Archbishop Desmond Tutu. Here is what he said:

I never imagined I would live to see the day when the United States and its satellites would use precisely the same arguments that the apartheid government used for detention without trial. It is disgraceful.

In May of 2006, President Bush told German television:

I would very much like to end Guantanamo. I would very much like to get people to a court.

Earlier this year, Defense Secretary Bob Gates, new to his job, made clear that he also wanted Guantanamo closed. He said:

There is no question in my mind that Guantanamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States.

He said that at the Munich Conference on Security Policy earlier this year. On February 27, following an Appropriations Committee meeting, I personally asked him what he thought, and he said, equally as succinctly as General Powell, that he thought it should be closed.

The following month Secretary Gates told the House Defense Appropriations Subcommittee that trials at Guantanamo would lack credibility in the eyes of the world. In March, Secretary of State Condoleezza Rice said:

The President has been very clear, and he is clear to us all the time. He would like to see it closed. We all would.

Well, then why is the Republican side preventing us from having a vote today or tomorrow or the next day that would say that Guantanamo should be closed within a year? How can the Secretary of Defense, the President of the United States, the Secretary of State make these comments that they want Guantanamo closed and the Republican side of the aisle prevent us from taking a vote in the Congress? I don't understand this.

Additional fallout from the Military Commissions Act is that it has stymied further trials under its auspices. Two military judges recently found that the detainees have been incorrectly classified as "enemy combatants" rather than as "unlawful enemy combatants." So that is another hitch in this. They have classified people wrongly so they can't be tried.

Recently, a lieutenant colonel, who was part of this process from an intelligence point of view, in an affidavit has stated that even this classification was based on vague and incomplete intelligence. Lieutenant Colonel Abraham also said tribunal members were pressured by their superiors to rule against detainees, often without specific evidence, and that military prosecutors were given "generic" material that did not hold up in the face of the most basic legal challenges.

Now, let me be clear: I have no sympathy for Taliban fighters, al-Qaida terrorists, or anyone else out to hurt the United States, or commit cowardly and despicable acts of terror. There is nothing in this amendment that puts terrorists back on the street. That is not the goal. Any argument that this amendment would harm national security is flat out false.

I believe what harms national security is sacrificing our Nation's values—which have made us rightly the greatest democracy in the world—by setting up a hybrid system of justice, by not following the Uniform Code of Military Justice, but by creating this hybrid system, which has failed court tests now and will quite possibly fail another one shortly.

Now, how do you stop all this? As long as you have this extraterritorial facility out there, without the light of day shining on it, you can't. Today, two of our colleagues are visiting Guantanamo. Unfortunately, I couldn't go with them. The last time I visited Guantanamo was with Secretary Rumsfeld, rather early on, and I suspect what they will find is a rather well-run, strong, staunch military prison. But that doesn't mean the justice that is dispensed there is correct if it is secondary justice, if it is sublevel justice, if there is limited right of appeal, if you don't have access to an attorney easily, if you can't see evidence against you.

One can say, well, Guantanamo is no Abu Ghraib, and I would most likely agree with that—today. There have been allegations of inappropriate behavior in terms of interrogation techniques, no question about that. I assume that is corrected now. But it still looms out there as a way the United States has of not allowing these prisoners to face justice. It is one thing if you are a terrorist; it is another thing if you are in the wrong place at the wrong time, if you are swept up, if you are put in either a cage or a cell at Guantanamo, and if you stay there year after year after year with no recourse. That is a stain on American justice. We criticize the Chinese for their form of administrative detention, and yet here we practice a similar thing.

We face a serious, long-term terrorist threat. It may well go on for the next 10 or even 20 years. We must track down, punish, and prosecute those who seek to hurt this country and hurt our people. At the same time, we need na-

tional policies that are both tough and smart, and this isn't smart. We will fight terror with vigor and drive and purpose, but we must not forget who we are. We are a nation of laws. We are a nation of value and tradition. These values have been admired throughout the decades all over the world.

The world has looked at Guantanamo and made the judgment that it is wrong. I think it is time for the Senate to do something about it. The Senate has borne the burden of Guantanamo for too long. The time has come to close it down. I appeal to the other side to allow the debate on the floor and to give us a unanimous consent time agreement so that there might be a vote in this body.

Mr. President, I yield the floor.

#### IRAQ

Mr. ALLARD. Mr. President, I rise today reflecting on the most pressing issues on the minds of the American public—that of the current situation in Iraq. We have been in Iraq for nearly 4½ years, and frustration is certainly understandable. I wish nothing more than to see the United States reach a point where our soldiers and sailors and airmen and marines are able to leave and the Iraqi people can stand on their own. Our military has done an exceptional job. That point cannot be debated. But as so many have said, victory and ultimate success in Iraq cannot be completed solely through military strength.

I wish also to specifically point out the leadership of the ranking member of the Senate Armed Services Committee, Senator JOHN MCCAIN, on this issue. Having just returned from Iraq, his pointed remarks on our united efforts in Iraq and the importance of our mission are much needed.

Senator MCCAIN understands, as I do, that the terrorist threat in Iraq will not stop, nor will our safety improve at home if our forces leave. In their own words, these dangerous ideologues continue to make bold and alarming threats worldwide, but even more importantly, they are backing up their words with action. They will continue to strike our allies in the gulf and they will continue to strike our friends in Europe, and I believe they will not hesitate to strike America again, as they did on September 11.

That said, I am extremely disappointed that more progress has not been made on the political and domestic security from within Iraq. The fact remains, Iraq is simply not ready to take over their own country today, and if the United States were to leave, the consequences would be nothing short of catastrophic. Al-Qaida is training, operating, and carrying out their missions in Iraq right now. As evidenced in Britain 2 weeks ago, they are clearly still a threat and are still determined to accomplish their goals of destroying western culture. That much has not changed.