

Several detainees' lawyers involved in some of the incidents denied that they had caused security problems. Neil H. Koslowe, a lawyer at Shearman & Sterling in Washington, called the assertion a "McCarthy-era charge" that was not supported by the evidence.

The dispute over the lawyers' role is one of the first issues the appeals court in Washington will have to decide as it opens a new chapter of the legal battle over Guantánamo. In 2005, Congress designated that court as the forum for detainees to challenge directly decisions made by the Pentagon's combatant status review tribunals designating them as enemy combatants.

But many detainees' lawyers have resisted filing petitions to review those decisions because Congress narrowly defined the arguments the appeals court could consider. The law said the court could review whether a panel's decision "was consistent with the standards and procedures" set forth by the Pentagon.

Instead, many detainees' lawyers pursued habeas corpus petitions, using the centuries-old legal proceeding to ask a judge for release from imprisonment. But after a complex trip through the courts, Congress last year passed a provision intended to strip courts of the authority to hear habeas corpus cases involving Guantánamo detainees.

A divided panel of the federal appeals court in Washington upheld that provision in February. And early this month, the United States Supreme Court declined to review that decision. Two justices, John Paul Stevens and Anthony M. Kennedy, said that before the Supreme Court could again consider whether Congress was permitted to strip the courts of the ability to consider the habeas corpus cases, the detainees had to try to complete the appeals court review of their enemy combatant decisions.

As a result, much of the focus in the legal battle is now shifting to the appeals court. Scores of petitions seeking review of the combatant-status rulings are expected to be filed in the coming weeks, according to the Center for Constitutional Rights, an advocacy group that has been coordinating the detainees' lawyers. The May 15 arguments will focus on rules that could apply to all of those cases.

Lawyers say they are pressing ahead with the more limited review process in the appeals court as part of an effort to set the stage for a return to the Supreme Court. Some lawyers said that while they may lose, that would allow them to argue to the Supreme Court that the reviews were so limited that the detainees needed the more sweeping consideration permitted in habeas corpus cases.

But government lawyers, too, are developing new strategies in the wake of the Supreme Court action this month. They say that Congress and the courts have determined that expansive habeas corpus petitions are not available to the detainees.

As a result, they say, rules like those that allowed unlimited visits with detainees are no longer necessary as the detainees pursue the more limited appeals court review.

But, while arguing that detainees have no right to lawyers, the Justice Department filing said the government was giving the Guantánamo detainees enough access to lawyers so that "the court's review will be assisted by having informed counsel."

Washington Post

April 25, 2007

Pg. 10

Canadian Detainee Charged In '02 Death Of U.S. Soldier By Dan Eggen, Washington Post Staff Writer The U.S. military filed charges of murder and other crimes yesterday against a Canadian detainee whose family is alleged to have close ties to Osama bin Laden, launching the second case under a new military trial system at the naval base at Guantanamo Bay, Cuba. Omar Khadr, 20, is accused of killing a U.S. soldier with a grenade and injuring another during a firefight at an alleged al-Qaeda compound in Afghanistan in 2002. He was charged with murder and attempted murder in violation of the law of war, as well as conspiracy, spying and providing material support for terrorism, according to charging documents. Khadr is the second prisoner to be charged under the new military commission system created by Congress last year, after the Supreme Court struck down as unconstitutional a previous version of the trials.

He could become the first prisoner to face trial under the new system. The first defendant, Australian David M. Hicks, pleaded guilty last month to lending material support to

terrorists as part of a plea agreement. Hicks is scheduled to be turned over to Australian authorities by the end of May.

Although the murder charge could carry the death penalty, Khadr is not charged with a capital offense, according to military documents. He faces life imprisonment if convicted.

His military defender did not return a telephone call seeking comment.

Khadr was 15 when he was captured, and his case has attracted widespread attention in Canada, largely because of his family's notoriety. U.S. authorities say that the family lived in bin Laden's compound for several years and that his father, Ahmed Said Khadr, was a key al-Qaeda commander before he was killed by Pakistani troops in 2003. Omar Khadr's brother was imprisoned briefly at Guantanamo Bay.

The charges stem from a gunfight at a compound near Khost, Afghanistan, on July 27, 2002. Khadr surprised U.S. troops by throwing a grenade that allegedly killed Sgt. Christopher J. Speers and injured another soldier.

The U.S. military also alleges that Khadr received training from al-Qaeda, spied on U.S. troops, set land mines, threw grenades and fired shots at U.S. and Afghan soldiers.

Robert M. Chesney, a Wake Forest University law professor who closely follows the military commissions, said the government argues that Khadr is not entitled to the normal legal protections afforded soldiers because he was fighting on behalf of a non-state terrorist group. That allegation also forms the basis for charging Khadr with violating the law of war, Chesney and others said.

"Was it a violation of the law of war to throw a grenade at the soldier?" Chesney asked. "The government obviously believes it is. But others would say that it's not a war crime, that he just doesn't get the defense that normal soldiers would have."

Chesney said that unlike some of the other potential defendants at Guantanamo Bay, Khadr is accused of committing a crime that U.S. soldiers witnessed, making the allegations potentially easier to prove at trial.

Staff researcher Julie Tate contributed to this report.

Guantánamo defense team angry over Khadr charges Here is the full text of the statement from the attorneys for Omar Khadr of Canada, an enemy combatant at Guantánamo Bay, Cuba, following the Defense Department's announcement that he would be tried by military commission:

"We have just learned that our client, Omar Khadr, has been charged by the United States government with several offenses that are not even valid war crimes, for which he will be tried by military commission under The Military Commissions Act of 2006. This is the third set of charges laid against Omar. Yet, no matter how many times the government issues new charges, the military commissions system will continue to be an illegitimate one. Indeed, the system is virtually indistinguishable from the one previously invalidated by the Supreme Court in Hamdan v. Rumsfeld just last year.

"The recent plea agreement accepted by David Hicks after less than a day of military commission proceedings and after significant negotiations between Australia and the U.S. demonstrates that the resolution of these cases is political and not the result of a legal process. Clearly, the U.S. is using the case of Omar in an attempt to rehabilitate the military commissions, which Hicks' plea demonstrated is a tainted process. In doing so, the U.S. will be the first country in modern history to try an individual who was a child at the time of the alleged war crimes. Indeed, the charge of conspiracy against Omar is based on alleged acts some of which occurred when Omar was less than 10 years of age.

"Omar Khadr was taken into U.S. custody at the age of 15 and has been detained at Guantánamo since he was 16, in conditions equal to or worse than those given to convicted adult criminals, such as prolonged solitary confinement and repeated instances of torture. After nearly 5 years in such conditions, the government is now demanding his appearance before what can only amount to a kangaroo court. The fact that this Administration has seen fit to designate this youth for trial by military commission is abhorrent.

"Now is the time for Canada and the U.S. to negotiate a political resolution because the commissions system is incapable of justice. Otherwise, Omar, just barely twenty years of age and a minor at the time of the alleged crimes, is guaranteed to be convicted in one of the greatest show trials on earth. This should not be the legacy of America or Canada."

Signed,

Muneer Ahmad
Kristine Huskey
Richard Wilson
American University
College of Law
Washington D.C.
Lt. Col. Colby Vokey
U.S. Marine Corps.
Lt. Cmdr. William Kuebler
U.S. Navy
<http://www.miamiherald.com/416/story/85286.html>

U.S. returns 2 Guantanamo detainees to Afghanistan and Morocco SAN JUAN, Puerto Rico: Two detainees at the U.S. military prison at Guantanamo Bay – an Afghan and a Moroccan – have been transferred to the custody of their native countries, authorities said Thursday. The men were flown out of the U.S. Naval base in southeastern Cuba on Tuesday, according to Guantanamo spokesman Navy Cmdr. Rick Haupt. They were allowed to leave after a military review of whether the prisoners have intelligence value or pose a threat to the United States. The military does not provide details about individual cases. About 380 detainees remain at Guantanamo on suspicion of links to al-Qaida or the Taliban, including 80 who have been deemed eligible for transfer or release. The vast majority have been held for years without being charged. "These transfers are a demonstration of the United States' desire not to hold detainees any longer than necessary," a Pentagon statement said. Some 395 detainees have been released or transferred since the Guantanamo detention center opened in January 2002, according to the military.

<http://www.iht.com/articles/ap/2007/04/26/news/CB-GEN-Guantanamo-Detainee-Transfer.php>

MPAC Director Reports on Visit to Guantanamo Bay Detention Center April 17, 2007 Last week, Muslim Public Affairs Council Executive Director Salam Al-Marayati was the first Muslim American to observe conditions at the Guantanamo Bay detention facility. Amid the sirens sounded by human rights groups calling for the detention facility to be shut down, the U.S. military is trying to make the best out of a very bad situation. In an effort to present their perspective, the Pentagon invited legal scholars, analysts and journalists to visit the detention center on April 10, 2007.

Other members of the delegation included Quin Hillyer, editor of the American Spectator; Benjamin Wittes, formerly of the Washington Post and now with the Brookings Institution; Thomas Wells, president-elect of the American Bar Association; Thurgood Marshall, Jr., former Assistant to the President and Cabinet Secretary for President Clinton; David Rivkin, former Deputy Director of the Office of Policy Development for President Reagan; Dr. J. Peter Pham, professor of international politics at James Madison University; and Steve Engel, Deputy Assistant Attorney General at the Department of Justice. The visit was hosted by William Haynes, legal counsel to the Secretary of Defense Robert Gates, and coordinated on the island by Rear Admiral Harry Harris, Commander of the Joint Task Force (JTF) for the Guantanamo Naval base.

SEE: Air America "State of Belief" Interview with Salam Al-Marayati About Gitmo Trip
<http://interfa.wmod.llnwd.net/a117/o1/SBAudio/STATE_OF_BELIEF_04-15-07.mp3> (4/15/07) SEE
ALSO: www.airamerica.com/stateofbelief

MPAC acknowledges the efforts of our troops in carrying out the orders of our policymakers with professionalism, even if the policies are wrong. MPAC commends and supports Defense Secretary Robert Gates' <<http://www.cbsnews.com/stories/2007/03/23/terror/main2599984.shtml>> public call for the closing of the prison. This stance has been supported by human rights

groups which have investigated and condemned U.S. interrogation and incarceration practices at Guantanamo.

Sam Zarifi of Human Rights Watch provides this critique in his commentary, "A Few Good Men at Gitmo" <<http://hrw.org/english/docs/2004/09/13/usdom9344.htm>> : "The military commissions now taking place at Guantanamo Bay, Cuba, fall somewhere between a trial and a farce. The military officials involved in the process all seem committed to doing the best they can, but it is clear that they are struggling to make sense of a needlessly complicated and faulty system foisted on them for political purposes, not justice." Amnesty International also hosts a web page dedicated to the closure of Guantanamo <<http://web.amnesty.org/pages/guantanamobay-index-eng>> , calling it a symbol of injustice and abuse.

That said, the inclusion of a Muslim American representative on the trip is an important demonstration of engagement undertaken by the Pentagon to initiate dialogue on this important domestic and international flashpoint. As MPAC has underscored repeatedly, continuing interaction between the U.S. government and the Muslim American community is a welcome and necessary step for both the security of the nation and the political integration of more than six million Muslim Americans.

Summary of the Trip

During the tour, military officials briefed the delegation on the treatment of detainees. They repeated stressed that more detainees have been released, about 390, than currently remain at the U.S. Naval base, and emphasized the desire of U.S. officials, including President Bush, to "get them all out." Military officials at Guantanamo asserted that some Muslim countries have denied repatriation of detainees who have been cleared for release.

They reminded the visiting group that the base is under constant scrutiny from approximately 1,000 journalists and hundreds of human rights lawyers, along with congressional oversight, which has forced more transparency in the procedures of detainee treatment. Military officials strive to perform and enforce with perfection the instructions received from the President and his Cabinet officials, and the delegates were impressed with the meticulous execution of the Joint Task Force on Guantanamo.

The detainees' designation as "enemy combatants" does not afford them due process, otherwise guaranteed if they were defendants in a criminal court of justice. Nonetheless, military officials emphasized in the briefing that one key aspect of the Joint Task Force for Guantanamo Bay (JTF) is to provide "safe and humane care" of the detainees.

To that end, the base is clean and orderly, and military officials vehemently reject any claims of torture or Quranic desecration. Meals provided to detainees are certified as halal (prepared according to Islamic dietary law), served three times daily, and provide 4000-5000 calories daily, greatly surpassing the daily recommended caloric intake. Officials also stressed their respect for the prisoner's Islamic faith, repeatedly mentioning that each cell has a Quran and an arrow indicating the direction for prayer (qibla). They also pointed to the presence of the International Red Cross, which has a permanent installation on the island.

MPAC's Observations

The problem with Guantanamo is not the operation per se but the poor policy that created a detention center that does not serve American interests and is in violation of basic human rights. While government officials have stated a desire to shut the detention center down, real political will on Capitol Hill among the administration and lawmakers must be demonstrated in order to turn this into an overdue reality.

The delegation was not allowed to speak with any detainees, who were out of sight for the most part. One of the glaring problems in the procedures at Guantanamo is the lack of legal representation of detainees facing the Combatant Status Review Tribunal. Even the military-appointed lawyer cannot advocate for the defendant before the tribunal. Extra-judicial practices such as those at Guantanamo provide political and religious extremists a recruiting tool, particularly when they can point to contradictions with the U.S. campaign to promote democracy throughout the world.

The ways and means by which detainees were captured and transferred to Guantanamo are key factors in determining the validity of their detention in the first place. Were they Al-Qaeda agents planning attacks on America and if so, on what evidentiary basis was that determined? Corrupted intelligence has become too often an overlooked mistake in various incidents, first and foremost the make-up of the argument to go to war in Iraq. The American public will become more confident in decision-making at the policy and military levels of our government if more transparency is placed in the process.

Providing detainees with legal rights through the military tribunal is crucial to establishing this transparency. The lack of legal representation provided to detainees when they are in front of the Combatant Status Review Tribunal undermines our national commitment to the rule of law. Without adequate legal representation, the detainees are deprived of basic human rights.

SEE: MPAC Commends Supreme Court Ruling on Gitmo Military Tribunals
<<http://www.mpac.org/article.php?id=365>> (1/3/07)

There were other troubling observations made by Al-Marayati. In Camp 6, detainees were pacing back and forth in claustrophobic cells. One elderly man looked at the delegation from afar with a gaze of despair, another plastered his face to a glass window. In other prisons, hardened criminals usually behave differently, whereby lifelessness is manifested in a more callous way. MPAC recommends that the government look to criminal psychoanalysts and psychiatric professionals to assess the mental state of the detainees. Amnesty and the International Committee of the Red Cross are both concerned that the conditions at Guantanamo could lead to adverse mental and psychological conditions of detainees.

MPAC supports the recommendation made by International Red Cross Committee President Jakob Kellenberger <<http://www.icrc.org/web/eng/siteeng0.nsf/html/kellenberger-interview-191006>> , who said last fall: "People suspected of having committed war crimes or any other criminal offence can and should be prosecuted. But these individuals must be afforded essential judicial guarantees such as the presumption of innocence, the right to be tried by an impartial and independent tribunal, the right to qualified legal counsel and the exclusion of any evidence obtained as a result of torture or other cruel, inhuman or degrading treatment."

As Defense Secretary Gates has argued, the U.S. should imprison and conduct the trials of these suspects elsewhere, because Guantanamo is identified in the minds of other nations with torture. Nonetheless, the JTF is preparing state of the art court chambers for military tribunals to take place on the island. As such, it is a permanent stain on this nation's reputation and a constant reminder to others of past U.S. mistakes. That inhibits other countries' cooperation with the United States.

MPAC will provide policy recommendations to Mr. Haynes and other U.S. officials on counterterrorism policies in hopes of enhancing America's national security while respecting human rights. MPAC also calls on the President and the Congress to devise a mechanism to "get them all out" with more efficiency compared to the sluggish-pace of government progress on this issue so far.

It is clear that the Admiral and his staff believe they are serving our country and they are doing so with professionalism. For that, they must be commended. However, as Al-Marayati told

senior military officials last week, "the medical metaphor may apply here: the operation is a success but the patient is dying". To that, military officials in Guantanamo replied affirmatively and pointed to the policymakers who are responsible for giving them further orders.

The Muslim Public Affairs Council is an American institution which informs and shapes public opinion and policy by serving as a trusted resource to decision makers in government, media and policy institutions. MPAC is also committed to developing leaders with the purpose of enhancing the political and civic participation of American Muslims.

Pep prof and Guantanamo

DEMI JONES

Staff Writer

The smell of salt in the air, sandy beaches stretching for miles, the ocean sparkling under the sun. What does this image bring to mind? A hot vacation spot maybe? Or the view seen every day from Pepperdine? What about the view from Guantanamo Bay, Cuba's detention facilities?

Dan Caldwell, a professor of social sciences at Pepperdine, toured the detention facilities at Guantanamo in February, as part of a program called the Joint Civilian Orientation Conference. The JCOC is an effort established by the Department of Defense (DOD) in 1948 to inform opinion makers about military programs. DOD chose members from across the country for the public outreach program and it was extremely selective. To join JCOC one must be nominated by one of the major offices of DoD or a JCOC alumni. Members are typically influential in the country and have some expertise in DoD or "strong" relationships with senior members of the military. According to the JCOC website (<http://jcoc.dod.mil>), "JCOC participants attend briefings by senior military and civilian officials followed by hands-on experience observing exercises, participating in training and interacting with troops stationed across the globe."

Guantanamo currently holds 397 detainees presumed dangerous to the United States. The detainees are all considered a direct threat to the United States.

During Caldwell's visit to Guantanamo he met with leaders, officials and military personnel along with touring the base and the facilities.

Upon first glance, Caldwell admitted to being impressed with the contrast between the detention facilities and the beautiful view.

"I was struck with the multi-sided nature of the place," Caldwell said. "Beautiful spot—but it's a prison."

Caldwell said there were two main reasons for visiting the facilities in Guantanamo: because the United States government says the "worst of the worst" are kept at Guantanamo, but on the other hand, many civil libertarians believe there is a violation of due process for the detainees. The biggest issue is whether or not they are entitled to due process and habeas corpus.

"I'm concerned about the presumption of guilt," Caldwell said. "Prisoners [there] are presumed guilty until proven innocent."

Despite Guantanamo's shortcomings, Caldwell was surprised at the conditions.

"I thought the prisons were in better shape than I was expecting," Caldwell said.

Caldwell, in a paper he is currently writing, described the island as consisting of five different Guantanos: the Cuban, the American military personnel, the detainees/prisoners, lawyers and secrets.

The Cuban Guantanamo relies on the "regularized and proper" relations that exist between the Cuban and American authorities. Although the base once employed 1,000 commuters during the Cuban revolution, only three remain. There is only one entrance/exit to the base and officials meet outside of the gates every three months.

The military side of Guantanamo is typical of any American base. The personnel live with their families and the base has its own high school, along with fast food restaurants such as McDonald's and Subway.

"It's like a tropical military base," Caldwell said. "None were angry about being there."

Next there are the prisons, which resemble a regular maximum security prison. Originally Guantanamo was the home of Camp X-Ray, the prison camps that shocked the world as the "cells" were merely covered fences, leaving the prisoners exposed to nature. Now that Camp X-Ray has been closed, there are currently three camps, containing six prisons, on Guantanamo, collectively called Camp Delta. The detainees are organized into the different camps based on the level of threat they impose on the United States.

Guantanamo gives rise to many questions about the treatment of the detainees, particularly relating to their legal rights. Because most of the detainees are not American citizens and because they are not in the United States they do not receive the rights of American courts. They have no right to an attorney, no right to see classified evidence against them, nor do they have the right to know the identity of their accusers, therefore Caldwell said, "they essentially have no way out."

The last element of Guantanamo is the "secret" Guantanamo. In this side, Caldwell mentions that Guantanamo currently holds the 14 highest detainees, but the CIA never revealed their locations. Assorted government publications and agencies admit to the presence of "Other Government Agencies" but these agencies are not specified.

Despite the multi-faceted Guantanamo, Caldwell was able to get a flavor for the treatment of the detainees by touring the facilities. In the prisons there is an area for Muslims to worship and each cell comes with prayer mats and a copy of the Quran. There are also arrows throughout the centers pointing to Mecca and the guards allow a quiet time during prayer times.

"They are treated humanely with respect to their religion," Caldwell said.

The camps also have good medical centers for the prisoners. In Caldwell's paper he states that the health of the detainees is of great concern to the personnel. The detainees have their own hospital with seven full-time physicians and 150 medical personnel. They have performed 300 surgeries and provide prosthetic devices and physical therapies for those who were injured in combat.

Caldwell also respects and sympathizes with the Joint Task Force (JTF) soldiers working at the base.

"It is a tough job they're doing," Caldwell said. "They're doing their duties, but they're stuck between a rock and a hard place."

Another concern that Caldwell has for the JTF is that prisoners often want to harm them.

"Detainees are angry at them as a symbol," Caldwell said.

Therefore, the JTF has to refrain from wearing name tags and calling each other by name while in the centers. The guards are often harassed by the detainees, especially the female guards. In Caldwell's paper he added: "I marvel at the ability of those connected with JTF to perform their duties."

Although the conditions of Guantanamo's camps seem impressive, Caldwell also mentions, "I only saw Guantanamo in the middle of the day."

As the detainees are held longer, the question of whether their legal treatment is fair continues to grow and create more conflict.

"If you assume they are enemies, they're treatment is pretty good. If you assume they aren't, it's bad," Caldwell said. "I felt that ambivalence when I was there."

Submitted 04-23-2007

The inhuman stain

In its conduct towards the detainees of Guantánamo, the Bush administration is fighting not so much a war on terror, as a war on justice.

Chain reaction: a shackled detainee on his way to a hearing at Guantánamo.

Photograph: Brennan Linsley/AP.

In the latest round of never-ending court filings, the Bush administration's scorched earth litigation tactics involving the prisoners at Guantánamo continue apace

<http://www.nytimes.com/2007/04/26/washington/26gitmo.html?_r=1&th&emc=th&oref=slogin> .

Advancing legal arguments which the civilised world reviles as morally repugnant, the government renews its claims that: 1) prisoners have no right to counsel; 2) the military is free to disregard the attorney-client privilege that, among other things, may be outlining

legal strategy; and 3) prisoners' attorneys who have security clearance are forbidden access to classified information.

Representing the prisoners at Guantánamo is, perhaps, the most difficult legal task I have undertaken in a career in which I have tried murder cases, represented Fortune 500 companies in massive, multi-district class actions, and prosecuted cases as a Special Assistant United States Attorney. But it is impossible to represent a client in a meaningful way if you are denied reasonable access to your client. Consider the case of a prisoner who has been in isolation for more than a year and does not possess all his faculties. What is the likelihood that he will agree to have you represent him based on a single meeting? And what is the likelihood that such a client would be able to assist in his own defence even if he did? It is also impossible to represent a client if you are forced to share your litigation strategy with the military. Does any legal system in the world require one side to expose its strategy to the other?

Finally, it is impossible to represent a client when you are unable to review the evidence against him. We know the result; it has happened innumerable times in the tribunal processes at Guantánamo. The following is an actual colloquy that took place between a prisoner and the tribunal after he was read the charge against him:

Prosecutor: While living in Bosnia, the detainee associated with a known al-Qaida operative.

Detainee: Give me his name.

President of the tribunal: I do not know.

Detainee: How can I respond to this?

President: Did you know of anybody who was a member of al-Qaida?

Detainee: No, no.

President: I'm sorry, what was your response?

Detainee: No. If you tell me the name, I can respond and defend myself against this accusation.

President: We are asking you the questions and we need you to respond to what is on the classified summary.

Although this could have come from *The Adventures of Alice in Wonderland*, it is the Bush administration's version of justice at Guantánamo.

Sadly, the world knows why the Bush administration wants to close the window on Guantánamo. Through the work of attorneys and NGOs, the horrors of Guantánamo and the CIA black sites are being exposed. The Bush administration frequently asserts that the prisoners at Guantánamo are among the most highly-trained, vicious killers in the world, calling them the worst of the worst. But the staggering number of innocent men at Guantánamo belies this hollow pronouncement.

Leaving aside the high-risk prisoners who were recently transferred to Guantánamo, what do we know about the men who have been held without charge for more than five years? If the administration had its way, the public would know nothing. Guantánamo would have remained the torture and interrogation centre beyond the rule of law that the administration intended it to be. But following the supreme court's decision in *Rasul v Bush*

http://en.wikipedia.org/wiki/Rasul_v_Bush , which allowed attorneys access to the prisons, we now know the faces of the men who inhabit the isolation cells at Guantánamo.

Take David Hicks http://en.wikipedia.org/wiki/David_Hicks , the original poster boy for the Bush administration, a terrorist seemingly on the fast track to a death sentence, but for the intervention of a military JAG [Judge Advocate General's Corps] officer who refused orders to plead his client guilty. In a trial that was more circus than serious, the military offered no evidence that Hicks ever took up arms against the United States or committed any violent acts. If the United States had not attacked Afghanistan, David Hick's actions would not even

be criminal. Eventually, Hicks pleaded guilty to a single charge of training with the Taliban and was sentenced to nine months. After being tortured and held for more than five years, most of it spent in solitary confinement, David Hicks will soon be free.

But what about the prisoners at Guantánamo who will never be charged? Declassified portions of the Combat Status Review Tribunals, which were released by the military in response to a Freedom of Information Act request, reveal that the majority of the prisoners are not terrorists. Of all the prisoners at Guantánamo, only 8% were found by the military to be al-Qaida fighters. The military concluded that 55% committed no hostile act against the United States. Only 5% of the prisoners at Guantánamo were captured by the United States. A vast number of the prisoners at Guantánamo - 86% - were turned over by warlords in Pakistan and Afghanistan in return for huge bounties offered by the United States.

Given the foregoing, how does the military justify classifying the prisoners as enemy combatants? Setting aside the absolute inability of the prisoners even to see the evidence against them, much less meaningfully defend themselves, perhaps the following explanation sheds some light on the subject. In many cases, military tribunals found prisoners to be enemy combatants on the basis of their affiliation with 72 different terrorist organisations. The only problem with such a finding is that 52 of the organisations, 72% of the total, do not even appear on the Patriot Act terrorist exclusion list or State Department exclusion lists. Members of 64 of the 72 groups identified by the military as terrorists, 89% of the total, would be permitted entry into the United States.

In the final analysis, however, it is the government's breathtaking ability to classify almost anyone an enemy combatant that accounts for the continued detention of most of the prisoners at Guantánamo. At a hearing before Judge Green in December 2004, the government revealed the extent of its authority to detain the innocent indefinitely. Answering a series of hypothetical questions posed by Judge Green, the following, clearly innocent individuals all fall within the purview of the government's definition of an enemy combatant: 1) a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan, but really is a front to finance al-Qaida activities; 2) a resident of London who collects money from worshippers at mosques to support a hospital in Syria, but unknowingly entrusts the money for that purpose to someone in al-Qaida; 3) a resident of Dublin who unknowingly teaches English to the son of a person the CIA knows to be a member of al-Qaida; 4) a Wall Street Journal reporter who knows the location of Osama bin Laden, but does not reveal it to protect her source.

Begrudgingly, the administration has released more than 400 prisoners. Of the 245 released prisoners we have been able to follow, we know that 205 were either freed without charge or cleared of charges relating to their detention at Guantánamo. The head of Afghanistan's Reconciliation Commission is on record saying that all 83 Afghans who were repatriated were innocent and ended up at Guantánamo because of tribal or personal rivalries. A senior official in the Pakistani Interior Ministry has said investigators determined that 67 of 70 prisoners repatriated to Pakistan were sold for bounties by Afghan warlords who invented the links to al-Qaida. He is quoted as saying, "We consider them innocent." Thirty detainees repatriated to Britain, Spain, Germany, Russia, Australia, Turkey, Denmark, Bahrain and Maldives were freed, some within hours after being sent home for "continued detention". All of the Saudis who have been repatriated, with the exception of the most recently released group, have been freed.

Although the Bush administration continues to assert that the men who populate the prisons at Guantánamo pose a threat, the facts and statistics belie that contention. My experience, and that of most of my colleagues, is that, like the little old lady from Switzerland, most of the prisoners are innocent. The Bush administration would do well to reflect on Gandhi's and Martin Luther King's admonishment that it is not possible to have peace without justice. Amen.

http://commentisfree.guardian.co.uk/brent_mickum/2007/04/the_inhuman_stain.html

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CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
April 26, 2007
Senate Armed Services Committee Holds Hearing on Detainees
LIST OF PANEL MEMBERS AND WITNESSES

LEVIN:

Good morning, everybody.

America's standing in the world has taken a nosedive since the world embraced us after 9/11. According to a recent poll conducted by the Program on International Policy Attitudes, 67 percent of the people surveyed across 25 countries disapprove of the U.S. handling of Guantanamo detainees.

The program director explained that, quote, "The thing that comes up repeatedly is not just anger about Iraq. The common theme is hypocrisy. The reaction tends to be, 'You were a champion of a certain set of rules, now you're breaking your own rules.'"

The secretary of defense recognized this problem last month when he acknowledged that he had recommended closing Guantanamo because there is a taint about it.

America at its best is a beacon for human rights and human liberty, and that's how we like to see ourselves. But much of the world sees us in a very different way when we fail to live up to the standards that we profess.

For us, the symbol of American values is the Statue of Liberty. For much of the world, it is that horrific photograph of a hooded prisoner at Abu Ghraib, standing on a box, strung up with wires.

It's no doubt hard to care about due process for people like Khalid Sheikh Mohammed and Abu Zubaida. But, as Senator Graham said at the time of our trip to Guantanamo to observe the tribunal for Khalid Sheikh Mohammed, it's not about them, it's about us.

There are many reasons not to allow abuse of detainees or the use of coerced testimony: It's morally wrong.

LEVIN:

It produces unreliable information. It violates domestic and international law. It undermines the support we need in the world community to win the war against terrorism. And it jeopardizes our own troops if they are captured.

But there is also this: People are less likely to believe what we say about our detainees if they've been abused. Even when an admitted terrorist like Khalid Sheikh Mohammed confesses to the most heinous of terrorist acts, the world focuses far too much on how we treated him and not nearly enough on what, by his own words, he did to us.

In sum, when we fail to uphold our own values, we undermine our own security.

The administration would like us to believe that detainees' allegations of abusive treatment are fabrications, based on Al Qaida training manuals. But listen to what our own people at Guantanamo were saying.

In late 2002, FBI personnel at Guantanamo objected to aggressive military interrogation techniques. Law enforcement personnel -- our law enforcement personnel --

questioned the legality of these techniques and told their own FBI leaders back in Washington, quote, "You won't believe it."

And a Defense Department investigation led by Lieutenant General Randall Schmidt found that the use of these techniques constituted "abusive treatment."

Last September, this committee approved on a bipartisan 15-9 vote a bill that would have helped address the problems caused by our treatment of detainees by establishing new procedures for trying detainees, consistent with the Supreme Court's ruling in *Hamdan v. Rumsfeld*.

LEVIN:

However, this bill was never taken up by the full Senate.

Instead, the administration persuaded a majority of Congress to: one, narrow the accepted definitions of cruel and inhuman treatment; two, authorize the administration to unilaterally redefine its obligations under the Geneva Conventions; three, allow the use of hearsay and coerced testimony in criminal trials of detainees; four, insulate senior administration officials from accountability for detainee abuses; five, bar detainees from ever bringing any legal action challenging any aspect of their detention; six, prohibit the courts from providing legal relief for detainees who are found to be improperly held.

Most detainees will never be tried by a military commission, so they will not receive even the limited rights provided by the Military Commissions Act.

Under procedures established by the administration for conducting the combatant status review tribunals at Guantanamo, these detainees -- which are most of them -- can be detained without a criminal trial for life as enemy combatants on the basis of coerced testimony and hearsay evidence, without having a lawyer, without knowing what the evidence was against them, and, therefore, without having a reasonable opportunity to disprove the evidence.

LEVIN:

In proceedings in federal district court in 2004, Justice Department attorneys went so far as to take the position that the executive branch has the authority to unilaterally detain as enemy combatants, quote, "a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance Al Qaida activities," close quote, or, quote, "a person who teaches English to the son of an Al Qaida member," close quote.

The administration's definition of the term "enemy combatant" does not even require that that support provided, as they allege, to terrorist activities be knowing or intentional support.

Professor Mark Denbeaux of Seton Hall University, who will be testifying here today, has reviewed the publicly available records of CSRTs -- these tribunals that determine the combatant status -- which are conducted at Guantanamo.

Professor Denbeaux found, among other things, that the government never called a single witness at any of the 393 proceedings for which full or partial records have been released, and that for 93 percent of those hearings, the detainee was not provided access

to any of the classified or unclassified evidence relied upon by the government to determine his status.

Professor Denbeaux also reports that only 5 percent of the Guantanamo detainees were captured by U.S. forces on the battlefield, compared to 86 percent who were apprehended either by Pakistan or the Northern Alliance and turned over to the United States at a time when the United States was offering large bounties for turning over suspected terrorists.

I believe that the current tribunal process falls short of the Supreme Court requirement that an alternative to habeas corpus must be adequate and effective to test the legality of a person's detention.

LEVIN:

I believe that this process fails to provide the protections that we would insist upon for our own troops, that it fails to meet our standards as a nation, and that it undermines our position in the world and our own security.

If so, we have an obligation to act now to establish a process which we can defend.
Senator Warner?

WARNER:

Mr. Chairman, first I'd like to put in a statement on behalf of the distinguished ranking member, Senator McCain, who is unable to be with us here today.

LEVIN:

Thank you.

WARNER:

I'd like to step back. You have given a lot of specific examples, and let's look at this thing in the context of what we as a republic, the United States as a republic, how we have dealt with this.

We have three branches of government, as you well know. And I think unquestionably we are proceeding in an orderly fashion to let each of the three branches of government address this complex issue.

First and foremost, I'm rather proud you recited that this committee stepped forward and passed a bill. You may recall, at that time I was privileged to be chairman. You were ranking member. And in some ways I acted not to the full support of my party and our side of the aisle at that time.

But we got it through, and then we did work out a reconciliation of some differences with the administration. And the important thing is, the first step was taken with total transparency, total opportunity for debate, and the Congress of the United States, the Senate voting 65-34, the House of Representatives 250-170.

WARNER:

So step one of our triumvirate of branches worked.

Then we moved to step two, and that was the administration beginning to process the cases. And that they've done.

Step three is for the federal judiciary to review the actions of both the Congress and the administration acting in concert with the law to determine its constitutionality. The Supreme Court has given a preliminary ruling, on the 15th, the possibility further action should be taken.

What we're trying to do in this hearing is get out ahead of the process that the founding fathers laid down for this government to operate.

And I wish to remind all present here today, we're dealing about the most serious of consequences. This is a nation at war. We are doing everything to protect our citizens and our nation. And I think we've got to be exceedingly careful and act. As the founding fathers said, step one, the Congress; step two the administration acting consistent with the law; and three, the judicial process.

After those three steps have been taken, then it's of course an option of the Congress to step back in and review those actions.

LEVIN:

Thank you. Thank you, Senator Warner.

We're delighted that Senator Patrick Leahy, who is the chairman of the Judiciary Committee, is our first witness.

And as always, it's great to see you here, Senator Leahy, and we welcome your testimony.

WARNER:

Thank you. I join in that welcome, Senator Leahy. I know you spoke very forcefully in the course of the debates that I've alluded to as to your views.

LEAHY:

Well, thank you, Mr. Chairman.

Thank you, Senator Warner.

You're both good friends and both senators I respect highly.

I must admit, it feels a little bit different sitting down here. I spent some time -- I spent some time over the -- especially the past few weeks sitting up where you are.

But both of you talked about this not only here (inaudible), but the way we treat people who are detained by our government outside of the judicial systems. And the laws that we pass governing those detainees provides a window into our own values, our own traditions, our own identity as a country. The issue is central to the way America is viewed in the world, the way we view ourselves as a nation.

But, unfortunately, the image of America created by our treatment of detainees and by laws we have passed on this issue is not the kind of image that I or many of you would have preferred to present to the world.

Last year's Military Commission Act, reported by this commission, and then altered at the request of the White House before Senate passage, I believe was a mistake of historic proportions.

It is on the elimination of habeas corpus rights that I'd like to focus. Speaking first as an American, then as a senator, and then as chairman of the Judiciary Committee, I

believe it was the worst of the unfortunate changes made by that hastily passed legislation in the weeks before an election.

Senator Specter and I fought hard to remove the disastrous habeas provision from the bill, with the support of Senator Levin and many others came within a couple votes of prevailing.

I hope we can work together in a bipartisan way to correct this historic wrong. And I anticipate the Judiciary Committee will hold a hearing on the issue next month.

So with the help of the chairman and others, I hope we can fix this.

Justice Scalia, a conservative Republican, wrong in the Hamdi case, "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom of imprisonment -- from indefinite imprisonment at the will of the executive."

And the remedy that secures that most basic freedoms, of course, is habeas corpus. It provides a check against arbitrary detentions and constitutional violations, guarantees an opportunity to go to court with the aid of a lawyer to prove one's innocence. And this fundamental protection is rolled back in unprecedented, unnecessary way in the Military Commission Act.

The Military Commissions Act eliminated that right permanently for any noncitizen labeled an enemy combatant, even if the detainee is awaiting determination of whether the status of enemy combatant even applies.

So the sweep of this habeas provision goes far beyond the few hundred detainees currently held at Guantanamo Bay. It includes an estimated 12 million lawful permanent residents in the United States today. These are people who work here lawfully, pay taxes, abide by our laws. It applies to anybody who's visiting the United States legally, and other legal immigrants as well.

These are people we've traditionally welcomed to our shores.

LEAHY:

The new law means that any of these people can be detained forever, without any ability to challenge their detention in federal court.

And that's forever. I don't use that word lightly, but it's forever.

They can't challenge the detention anywhere, simply on the government's say-so they're waiting -- awaiting determination as to whether they're enemy combatant.

Now, Chairman Levin has used an example, and last fall I spelled out a nightmare scenario about a hardworking legal permanent resident who makes an innocent donation to a charity to help poor people around the world. That's in the finest American tradition.

But if that charity is secretly suspected, the person making the contribution doesn't even know this, but secretly we suspect it, that it's being -- it's funding critics of the United States government, that innocent act could lead to indefinite and unchallengeable incarceration.

On the basis of a charitable donation, perhaps a report of suspicious behavior from an overzealous neighbor, or from information secretly obtained, maybe from a cursory view of what that person borrowed from the public library, the permanent resident can be brought in for questioning, denied a lawyer, confined.

LEAHY:

They had no recourse in the courts for years or decades, or forever.

That's the kind of disappearance that America has rightly criticized and condemned in parts of the world ruled by autocratic regimes. That is not America. That's not the image of America we want the world to have.

And most people would view this kind of nightmare scenario as fanciful, but sadly it's not. Indeed, last November, just after enactment of these provisions, the scenario I spelled out was confirmed by the Department of Justice in a legal brief submitted in federal court in Virginia.

The Justice Department, in a brief to dismiss a detainee's habeas case, said that the Military Commissions Act allows the government to detain any non-citizen designated as an enemy combatant without giving that person any ability to challenge his detention in court. Even if the government has made a total mistake, it can't be challenged.

And this is not just at Guantanamo Bay. The Justice Department said it's true even of somebody arrested and imprisoned in the United States.

We've removed a vital check that our legal system provides against the government arbitrarily detaining people for life without charge. It's wrong. It's unconstitutional. And I'd say clearly it is un-American.

A group of four distinguished admirals and generals who have served as senior military lawyers argued passionately for fixing this problem in a letter they sent me last month. And I'd ask, Mr. Chairman, consent that that letter be included in the record.

LEVIN:

Will be made part of the record.

LEAHY:

They wrote -- let me just quote one part -- "In discarding habeas corpus, we are jettisoning one of the core principles of our nation precisely when we should be showcasing to the world our respect for the rule of law and basic rights. These are the characteristics that make our nation great. These are the values our men and women in uniform are fighting to preserve," end quote.

We should take steps to ensure that our enemies can be brought to justice. And I introduced a bill to do that back in 2002, as did Senator Specter, when we proposed to establish military commissions.

So establishing appropriate military commissions is not the question.

LEAHY:

But what we have to revisit and correct is the suspension of the great writ -- the great writ of habeas corpus -- for millions of legal immigrants and others, denying their right to challenge indefinite detention just because the government says they should be.

So in closing let me say, it's from strength -- it's from strength that America should defend our values and our way of life. It is from the strength of our freedoms, our Constitution and the rule of law that we can prevail.

We should not be legislating from fear. We can ensure our security without giving up our liberty.

I'll keep working on this issue until we restore the checks and balances that are fundamental to preserving the liberties that define us as a nation.

Mr. Chairman, I thank you for the privilege of appearing before this committee. This is the first committee I served on, 32 years ago, when I came to the Senate. I've always respected this committee. It's had some of the finest men who have chaired it in both parties. I see two of them before me right now.

Mr. Chairman, I can't tell you how passionately I believe in my own soul we've got to go back to America's basic values. That's what's going to make us safe. That's what's going to make us strong.

LEVIN:

Senator Leahy, thank you for your...
(APPLAUSE)

WARNER:

Mr. Chairman, if I could just ask our distinguished colleague...

LEVIN:

Before you do that, Senator Warner, let me just ask the audience, they're going to have to refrain from those kind of responses if this hearing is going to continue in a way which this issue is entitled to, which is a hearing where we're going to hear from witnesses, we're going to hear without demonstration from the audience.

The issue is that serious. It requires this kind of respect from the audience for different points of view. And we are going to ask everybody in the audience to please refrain from any further demonstrations.

Senator Leahy, thank you very much...

WARNER:

Thank you very much.

Could I just ask one word of our distinguished colleague?

Your remarks today coincided with the fervor and the commitment of your remarks during the course of the debate. But when you use the word "un-American," how do you wish to revisit that in the context of a significant majority of both the Senate and the House did approve this legislation?

LEAHY:

Well, Mr. Chairman, over the years, as we know, the House and the Senate has voted a number of things that we wish we could revisit. I'd go back to the internment of Japanese in -- Japanese-Americans in World War II.

LEAHY:

The House and the Senate agreed with the president, the president of my own party, in doing that -- and the governor of California, who later became the chief justice of the

United States. We were good enough decades later to admit that was a horrible mistake and did not follow our values. We made mistakes.

Senator Warner, I've cast more votes in the United States Senate than all but a dozen people in our nation's history. And I'm proud of that. Did I make mistakes in some of those? I know I have. And I'm willing to go back and revisit them.

But this is a mistake that will haunt not just us, but our children and our children's children if we don't correct it.

WARNER:

I don't wish to ever question the patriotic allegiance of any of our colleagues no matter how strongly our differences may be. And I just feel that we should allow the republic to function as the founding fathers said it. We're getting ahead of the judicial branch. How do you answer that? Why the urgency at this moment given that the judicial branch is consistently reviewing these decisions?

LEAHY:

The judicial branch is consistent in reviewing this, but since we passed this act we've had at least one court opinion that has gone along with our removal of the great writ of habeas corpus.

The fact is we are three independent branches of government. That doesn't mean that we can turn our responsibilities from one branch over to the other branch. We set the jurisdiction. For example, the federal courts, that's under the Constitution. We've done this over the years, sometimes wisely, sometimes unwisely.

Every one of us know -- should know in our core of our being one of the great -- one of the things that make us a great nation is our commitment to the great writ of habeas corpus. You talk about the founding fathers and what we did. The founding fathers knew that. The founding fathers fought a revolution to make sure we'd have those rights. Let us not in a matter of a day's debate or something do away with those rights.

We are not harmed as a nation by keeping to our traditions and our values and those balances.

LEVIN:

Senator Leahy, let me just ask you a quick question -- following up on Senator Warner's question -- do you know of any doctrine that requires, suggests that Congress needs to await a judicial outcome before it should legislate on an issue if it believes that it is important and appropriate to legislate...

(CROSSTALK)

WARNER:

I would yield. No, there is no doctrine.

(CROSSTALK)

LEAHY:

I think we'd all agree...

LEVIN:

I'm just asking Senator Leahy whether he's ever heard of a doctrine

LEAHY:

... there is no such doctrine and, in fact, Congress has, over more than two centuries -- has acted often without awaiting for a judicial determination on Marbury v. Madison on through where they say those -- our actions can still be reviewed. But we all know -- and within the service of the three of us we have done this a number of times.

LEVIN:

Senator Warner, would you add anything to...

WARNER:

No, that's fine. No, that's fine.

LEVIN:

Thank you.
Senator Leahy?

LEAHY:

Thank you. It is a privilege to be here. Thank you, sir.

CORNBYN:

Well, it's a privilege to have you. Mr. Chairman? Mr. Chairman? Mr. Chairman?

LEVIN:

Excuse me. I'm sorry. I should have asked other -- excuse me, Senator Leahy, forgive me -- I...

CORNBYN:

If I could just have three minutes.

LEVIN:

No, no, absolutely, Senator. No, no, I made a mistake in not looking to my colleagues to see if there's other questions. Forgive me.
Senator Cornyn?

CORNBYN:

I appreciate it, Mr. Chairman, and I should refer to Senator Leahy as my chairman as well. Of course, we serve together on the Judiciary Committee, and he and I have had the privilege of working together on some important legislation and I know we'll continue to have that opportunity in the future. But he and I obviously disagree on this issue, and I just wanted to ask a couple of very brief questions.

I'm not aware of any recorded English common law case that grants habeas corpus relief to an alien detained as an enemy combatant, and I wondered if the senator was aware of any case that so held.

LEAHY:

What I've referred to in this, Mr. Chairman, is the fact that, under this law, we can have any -- we can detain any alien. We could detain a professor who's here on -- teaching on sabbatical, an alien here with appropriate visas and everything else. That is not the issue.

This is so broad, we can detain anybody. We don't even have to go into the enemy combatant. We can detain anybody and say they are, whether they are or not. We have seen the mistakes that have occurred in this. We know that our government makes mistakes.

Point to the example out in Oregon where a lawyer -- a different situation, but a lawyer is arrested, his law practice virtually ruined because he was somehow suspected of being involved in the bombing of a train in Spain. When (inaudible) found out what a mistake it was, our government has paid him a very large sum of money.

CORNBYN:

The reason I ask this question, Mr. Chairman, is because I'm not aware of any case from the United States Supreme Court, any English common law case, that's granted habeas corpus relief to an alien detained as an enemy combatant, although it is clear, I think, from my reading of the cases, that an alternative method of providing judicial review is an important factor.

And I just -- you know, I'm familiar with the fact that lawyers disagree all the time. That's what lawyers do, and I attribute this to a good faith disagreement as to what the law requires but, ultimately, we have to, as Senator Warner suggested, submit these disputes among lawyers in good faith to the tribunals that are authorized under the law to resolve those disputes finally.

LEAHY:

Mr. Chairman, I'm not suggested that if you have an enemy combatant that we're going to write the law that allows that determination. But we will determine if you're being held properly or not.

This is not to give anybody any new rights or any different rights, but if anybody is picked up, held as -- and said, "You're an enemy combatant," right now they can't even raise the question, "You've got the wrong guy, you've got some" -- and we know this has happened over and over again to somebody of a similar name.

It's similar to what we see even in our -- as Americans when we fly.

LEAHY:

Senator Ted Kennedy's been stopped half a dozen or more times getting on a plane he's been taking for 40 years, because his list is on -- his name is on a no-fly list. It got mixed up with somebody else.

A year-old child is stopped until they get a -- his parents get a passport for him to prove he's not a 40-some-odd-year-old terrorist.

Catholic nuns. You know, you could go on and on.
The fact is mistakes are made. You've got to at least be able to go to court and say,
"Hey, you've got the wrong person."

CORNYN:

Mr. Chairman, again we disagree. In today's New York Times, in an article entitled "Court Asks to Limit Lawyers at Guantanamo," it's noted that in 2005 Congress designated that the Court of Appeals -- the D.C. Court of Appeals was the court -- is the forum for detainees to challenge directly decisions made by the Pentagon's combatant status review tribunals designating them as enemy combatants.

And I believe Congress has amply provided a tribunal and an opportunity for those determinations to be made and then challenged and reviewed by an impartial Article III court.

And, of course, as Senator Leahy acknowledged earlier, a divided panel of the federal Court of Appeals in Washington upheld that provision in February. And, of course, we'll all have to wait to see if, once it makes its way to the United States Supreme Court, whether that court does it.

But I just -- in closing, I think what Senator Warner has suggested has a lot of merit. We ought to give this law a chance to function, and allow the courts to do -- a chance to do their job.

But I respect those who hold a different opinion, and we'll all wait to see what the courts decide.

Thank you very much.

LEAHY:

Mr. Chairman, I hope everybody will read the letter from the four flag officers who agree with my position and feel that we are not helping our nation doing it this way.

Thank you.

LEVIN:

Certainly. I just -- is there anyone else, first of all...

SESSIONS:

Mr. Chairman...

LEVIN:

Yes.

SESSIONS:

I think that Senator Cornyn, former Justice Cornyn, has given a fair summary of where I see this matter.

The Constitution has never given enemy combatants -- lawful or unlawful -- who've been captured habeas corpus rights.

So what I understand this legislation to do, to be taking us a step we've never gone before. And that is to give classical habeas corpus rights to enemy combatants, even unlawful enemy combatants who have rejected the rules of warfare.

We have in fact -- and I'll go through in my remarks later -- provided quite a number of hearings and reviews, including an annual review, of anybody that's being detained, including a right -- as the senator indicated -- to go to court.

But it does appear to me that, while there may be some cases that need review as the system will allow, I do not believe that this Congress should go so far as to provide habeas corpus review to non-citizen enemy combatants seized on the battlefield.

LEVIN:

Let me ask Senator Leahy a question.

Am I not correct that your bill does not provide habeas corpus rights to anybody? It would eliminate the prohibition that was in the law that the Congress adopted against courts granting habeas corpus.

So ironically my two colleagues who have spoken on this, who say we should allow courts to do their job -- as a matter of fact it is the Congress -- am I not correct? -- that passed a law that removed from the courts a chance to do their job as they saw fit. Because we prohibit in our law courts from granting habeas corpus should they deem it fit.

LEVIN:

Is that not correct?

LEAHY:

The chairman is absolutely correct.

LEVIN:

So it's the opposite, I believe, of what you say, Senator Cornyn. I agree with you there may not be a case. There may not be a case where habeas corpus was granted to an enemy combatant.

That proves, it seems to me, the point that you shouldn't -- there's no need to take from the court the jurisdiction to grant habeas corpus if, in fact, they've never used that jurisdiction to grant it to an enemy combatant.

Why, in heaven's name, would Congress then take a radical step of denying courts the jurisdiction to grant a writ which they have never granted?

Why would we interfere with the courts to take from them the right to adjudicate?

And if Senator Warner is correct, as he often is, that we should allow the courts to do their work, it is our law which takes from the courts the right, should they deem it appropriate, to grant habeas corpus. And my...

LEAHY:

You're saying -- and not only that, but you're also saying what Admiral Guter, Admiral Hutson, General Brahms and General Cullen have said in the letter they've given to you.

They say -- I quote -- "It's certainly true that prisoners of war have never been given access to courts that challenge their detention. But the United States does have a history of providing access to courts to those who have not been granted POW status and instead are being held as unlawful combatants, as are the detainees in this conflict."

LEVIN:

And one last question from me -- and others may want to jump in here -- but is it not true that our Constitution, in Article I, says that, quote, "The privilege of the writ of habeas corpus shall not be suspended" -- they're referring to the Congress -- "unless, when in cases of rebellion or invasion, the public safety may require it."

Is that a correct reading?

LEAHY:

Absolutely. You have the...

LEVIN:

And as a matter of fact, has...

LEAHY:

I have the Constitution right here, and that's precisely what it says.

LEVIN:

Let me call on my colleague...

CORNYN:

Mr. Chairman...

LEVIN:

Senator Cornyn?

CORNYN:

I appreciate it. Mr. Chairman, it's my position that, even though there is no legal requirement to provide habeas corpus release to an alien that is an enemy combatant, that's -- and no one has cited any case to the contrary -- that we have gone a step further and provided an opportunity for both administrative and judicial reviews in a court, the D.C. Court of Appeals, which is acknowledged as the second highest court in the land.

So, rather than deny legal rights to our very enemies, people who do not observe the law of war and who have no regard for the distinction between those who wear the uniform and innocent civilians, we have, because I believe we are a great country that believes in the rule of law, gone further than the law required, by conferring that right of review.

And so that's, again, where we differ. And I respect your right to your views. And I hope it's a two-way street. Thank you.

SESSIONS:

Mr. Chairman?

LEAHY:

Of course, in the...

LEVIN:

Senator Sessions?

LEAHY:

Mr. Chairman, if I might say, in the Rasul case, the Supreme Court said the detainees could assert habeas rights. Now, that was before we passed this act. We've now removed the right.

(CROSSTALK)

And I'd be glad to stay here as long as you like. We also have the director of the FBI before our other committee. And I'm supposed to be chairing that.

LEVIN:

Do you have time for one more question?

LEVIN:

Senator Sessions?

LEAHY:

Of course. I'm here at your...

(CROSSTALK)

LEVIN:

No, no, no. You have your other responsibilities.

Senator Sessions?

SESSIONS:

I'm like Senator Cornyn, I have both my chairmen here, and my respect for both of you is immense, and both of you are exceedingly fine lawyers. Pretty good Armed Services Committee chairmen, but also a great lawyer.

LEVIN:

Among lawyers that's a compliment. Among the rest of the world, I'm not sure it is.

(LAUGHTER)

SESSIONS:

However, I think the true fact, Mr. Chairman, Armed Services Committee Chairman Levin, is that the Constitution does not confer habeas corpus rights on people seized on the battlefield.

The basis for Rasul and the case that indicated that there would be some right was based on a statutory act of Congress. And after full debate, we decided that statutory act had in fact created the possibility that all the unlawful combatants that we're capturing will end up suing us and overwhelming the court system. And we created a system, as the senator said, to provide justice without going through the normal habeas corpus rights that have never been given under the Constitution to prisoners seized on the battlefield.

I think that's a fair summary of it.

LEVIN:

Thank you. Thank you, Senator Sessions.

And thank you again, Senator Leahy. We appreciate your coming by.

LEAHY:

Thank you.

Now we'll call on our second panel.

Daniel Dell'Orto, who's the principal deputy general counsel for the Department of Defense. Admiral John Hutson, retired, former judge advocate general of the Navy. Jeffrey Smith, former general counsel of the Central Intelligence Agency. Neal Katyal, who's professor of law, Georgetown University Law Center. Mark Denbeaux, professor at Seton Hall Law School. And David Rivkin, who's partner of the law firm of Baker Hostetler.

Thank you, gentlemen, for coming by today. We've already indicated what a lively subject this is, even before this panel, which I know will continue the lively debate. We look forward to it.

Mr. Dell'Orto, we thank you for coming.

Mr. Dell'Orto, as I said, is the principal deputy general counsel, Department of Defense.

And would you please start?

WARNER:

Mr. Chairman, just one reference here. Very distinguished panel, but we have before us Mr. Smith. Mr. Smith was trained by this committee many, many years. So I hope that that training is manifested today in his remarks.

(LAUGHTER)

SMITH:

Thank you, Senator. It certainly sharpens the intensity of my preparation.

WARNER:

Correct.

LEVIN:

(OFF-MIKE) will remind Senator Warner after your remarks of the fact that you were trained here, so that he will then bear responsibility should he by any chance disagree with anything you might say.

Now, Mr. Dell'Orto, thank you for coming to join us today. And would you begin?

I think we ought to ask our witnesses, if you could keep your testimony, since there's such a large panel and many senators interested, to five minutes. And we'll put entire statements in the record. We would appreciate it.

Mr. Dell'Orto?

DELL'ORTO: