Testimony of

Bradford Berenson

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Committee, I appreciate the opportunity to testify before you today. The question the Committee is addressing this morning is an important one: how much access to our domestic courts should suspected foreign terrorists captured on the global battlefield they have to challenge their detentions? Arriving at the right answer to this question is vital both to ensuring that the United States does not compromise its commitment to the rule of law and fair procedure and to ensuring that we can wage war effectively in order to protect our liberties and our system of laws from those who wish to destroy them.

My perspective on these issues is informed by my experience as Associate Counsel to President Bush from January, 2001 through January, 2003. As a member of the President's staff during the immediate post-9/11 period, I was one of the lawyers that initially began to grapple with this complex questions, which seemed new at the time but which we quickly discovered are in fact very old. I assisted in the legal and policy research and analysis that resulted in the President's Military Order of November 13, 2001, which authorized the Secretary of Defense to establish a system of military commissions to try suspected terrorists. It was that Order the Supreme Court found, in it surprising ruling in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), was subject to certain provisions of the Uniform Code of Military Justice and the Geneva Conventions with which it did not comply, and which has thereby touched off the latest round of legislative activity on this subject. Since leaving the White House, I have returned to my private practice in Washington, D.C., but I have continued to follow closely the developments in this area of law and to contribute in whatever way I can to the ongoing public debate.

The genesis of the problem: Rasul v. Bush

The issue the Committee is examining this morning arises only indirectly from the Hamdan decision. Its real genesis is the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466 (2004), which held that suspected terrorists detained by the United States at the United States Naval Base in Guantanamo, Cuba had a statutory right to pursue habeas corpus relief in the federal courts. The Supreme Court's decision in Rasul was, to my knowledge, the first time in recorded history that any court of a nation at war had held that its enemies captured in battle had a right of access to its domestic courts and could sue the Commander-in-Chief to challenge their detentions. During World War II, for example, the United States had detained hundreds of thousands of German and Japanese enemy combatants. Many of those detainees were held here in the United States. Many also had plausible claims to having been captured or held in error or to having no enmity against the United States. Yet those prisoners were not outfitted with lawyers and invited to sue our commanders during the conflict. The federal courts were not swamped with requests to order the release of prisoners held in military custody while our troops were in the field. Indeed, with respect to enemy combatants held outside the United States, the Supreme Court unambiguously held in Johnson v. Eisentrager, 339 U.S. 763 (1950), that detainees enjoyed no right of habeas corpus in U.S. courts. The Court declined "to invest these enemy aliens, resident,

captured, and imprisoned abroad, with standing to demand access to our courts," reversing the court of appeals' determination to "g[i]ve our Constitution an extraterritorial application to embrace our enemies in arms." Id. at 777, 781. It was this decision that the Administration relied on in believing that litigation by Taliban and al Qaeda detainees held at Guantanamo would be summarily dismissed.

Rasul changed all that. It opened the floodgates - or, more accurately, it allowed the floodgates to remain open - to a massive amount of litigation in federal district court by militant Islamists held at Guantanamo against their captors. It is worth bearing in mind that virtually every single detainee at Guantanamo has now sued the President, the Secretary of Defense, and other military commanders, with the assistance of some of this country's finest lawyers, seeking to force the military to release them back into the world. Candor compels the recognition that, despite the careful screening procedures employed in the field and in Washington, there is likely to be some rate of error associated with the Guantanamo detentions. But whether that error rate is 2%, 5%, or 15%, it surely does not begin to approach 100%. The detainees may all claim to be shepherds or religious students captured by mistake or sold for bounties, but a large percentage of them are not telling the truth.

We thus found ourselves after Rasul with hundreds of our nation's most vicious enemies suing our military and civilian commanders in federal court seeking writs of habeas corpus. Indeed, now that Khalid Sheikh Mohammed, the al Qaeda mastermind of 9/11, has been transferred to Guantanamo, it may not be long before he, too, can continue his aggression against the United States, this time through our own court system. This widespread litigation distracted military commanders from their primary duties, caused innumerable difficulties in running the detention facility at Guantanamo, and soaked up enormous resources at the Department of Justice. It also allowed the detainees a propaganda platform in the midst of the conflict whose potency is already a matter of record.

Congress's attempted solution: The Detainee Treatment Act

Because the Supreme Court's decision in Rasul was based only on an interpretation of section 2241 and not the Constitution, Congress was free to address the serious problems caused by the Rasul decision with a legislative solution. The Congress immediately sought to overrule the Rasul decision, at least partially. While unwilling to subscribe to the traditional rule articulated in Eisentrager that no habeas corpus review at all would be available to enemy combatants held outside our shores, the Congress sought to strike a sensible compromise and to circumscribe detainee litigation within some reasonable limits.

In the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("the DTA"), the Congress established a process of formal administrative review of enemy combatant status for those detained at Guantanamo. The Combatant Status Review Tribunals (CSRTs) were charged with conducting reviews of each detainee's status and making an on-the-record determination of the basis for continued detention. Congress then provided for judicial review, akin to judicial review of administrative action, in the United States Court of Appeal for the District of Columbia Circuit. In each case, the D.C. Circuit was permitted by the Detainee Treatment Act to consider whether continued detention was consistent with the Constitution and laws of the United States. This standard was meant to permit judicial review of the lawfulness of the fact of detention but to eliminate judicial review of some of the more tenuous conditions-of-confinement type claims the detainees had begun to assert.

It is fairly clear to me that these formal procedural rights were not meant to be in addition to the existing habeas litigation but rather were intended to be a substitute for it. Indeed, a review of the congressional debate suggests that a desire to eliminate the floodtide of detainee litigation and to channel it into a more orderly and manageable process was a principal reason the DTA was passed in the wake of Rasul. Thus, in section 1005(h) of the DTA, the Congress enacted a provision that I believe most Members understood to mean that the new standards and procedures of the DTA would apply to all suspected terrorists in U.S. custody at Guantanamo, present or future, and would provide the exclusive judicial remedies for those individuals, whether or not they had already brought habeas corpus proceedings in federal district court. The problem of detainee litigation was thus brought under congressional supervision and control and the interests of the detainees had been balanced, as a matter of policy, against the interests of the United States to produce a fair and moderate mechanism.

The problem returns: Hamdan v. Rumsfeld

Unfortunately, the Supreme Court proved resistant to the policy choice made by Congress. In Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), seizing on an arguable ambiguity in the language of section 1005 of the DTA, the Supreme Court strained to preserve its own jurisdiction to hear Hamdan's challenge to President's military commission structure by concluding that the DTA did not apply to any of the actions pending on the date of its enactment, notwithstanding the fact that those actions had provided a major impetus for its enactment. Instead, the Supreme Court held that the DTA would apply only prospectively, so that all of the existing litigation in the federal district courts could continue apace. And it has.

Once again, however, if Congress believes the Supreme Court erred in this aspect of Hamdan, it has the opportunity to correct that error. Because the Court's decision rests only on a construction of the DTA itself, rather than any constitutional norm, Congress can restore the system it established in the DTA simply by asserting in clearer language than it did before that the procedures provided in the DTA are exclusive and are intended to apply to all pending actions, as well as those that might be filed in the future. That is exactly what the portions of the pending bill we are discussing this morning would do.

The questions before the Congress now are thus: (1) can Congress overrule this aspect of the Hamdan decision without running afoul of constitutional restrictions that were not at issue in Hamdan, and (2) should it?

The Suspension Clause

The question whether Congress should overrule Hamdan and redirect all detainee habeas challenges to the D.C. Circuit is a question that Congress has answered before, and it is not apparent why Congress would arrive at any different conclusion now. If the intent of Congress in the DTA was to cover pending litigation, then there is no further policy judgment to be made; all Congress needs to do is give effect to its original judgment, which the Supreme Court misinterpreted. But even if that were not Congress's original judgment, at a minimum, Congress has decided as a prospective matter that the DTA procedures represent the correct policy judgment about how much process terrorist suspects detained at Guantanamo ought to receive. There is no obvious reason why that policy judgment would not apply equally to detainees who have already sued as to those who have not. If the DTA procedures are the correct procedures

that best balance the competing interests, allowing dozens of cases to proceed on a parallel track under different procedures serves no real purpose and in fact creates very real risks of disparate treatment among similarly situated detainees. In any event, this Committee and the executive branch are in a far better position than I to discuss, weigh, and evaluate the competing policy considerations.

I will therefore devote the balance of my remarks to the principal legal issue affecting consideration of the provision in the proposed legislation that would overrule Hamdan and restore the DTA's procedures for judicial review of detainees' challenges to their detentions. This issue centers on the Suspension Clause of the Constitution, U.S. Const. Art. I § 9, cl. 2, and derives from a concern that the DTA procedures might somehow infringe on constitutional habeas corpus guarantees. Because I can only analyze the law, I have long since given up trying to predict decisions of the Supreme Court in cases that attract an unusual amount of public and international attention, but based on my reading of current law, I believe the risk that the Congress would violate the Suspension Clause by requiring the suspected terrorists at Guantanamo to follow the procedures in the DTA for judicial review of their detentions is exceedingly low. Enacting the habeas corpus and judicial review provisions now contained S. 3930 would, in my judgment, be consistent with the applicable principles of law under the Suspension Clause.

There are three essential reasons why this Committee and the Senate need not fear that the current compromise legislation imperils any constitutional rights of the detainees. First, to the extent the Suspension Clause itself requires any habeas corpus remedy for those in federal custody, the scope of the writ does not cover alien enemies of the United States, captured during an armed conflict, and held abroad. Second, even if it did, the DTA's procedures are a sufficient substitute for the traditional habeas corpus remedy available to those in military custody to satisfy any constitutional requirement. They are in fact considerably more generous than anything we or any other nation in the history of the world has previously afforded to our military adversaries. Finally, even if that were not the case, there is a strong argument that Congress has the power under the Suspension Clause in current circumstances to suspend or otherwise limit the applicability of the writ to alien enemies. I will explain each of these points in turn. First, however, I will provide a brief summary of the procedural mechanisms for judicial review afforded to the Guantanamo detainees by the legislation now under consideration.

Procedures established by the new legislation

There are two provisions in S. 3930 that affect the rights to judicial review of the Guantanamo detainees.

The first is new section 950j(b), which is added to title 10, U.S. Code, as part of the new military commissions code pursuant to section 4 of the bill. This section provides that judicial review of any and all matters "relating to the prosecution, trial, or judgment of a military commission" established by the Act must occur pursuant to the procedures set forth in new Chapter 47A of title 10. That chapter, in turn, provides that, following exhaustion of all appellate remedies within the executive branch, including the Court of Military Commission Review, a detainee may take an appeal to the United States Court of Appeals for the District of Columbia Circuit. That court is empowered to determine "the final validity of any judgment of a military commission." The scope of review is controlled by section 1005(e)(3) of the DTA. That section provides that there

is an appeal as of right for any detainee in a capital case or who has received a sentence of 10 years or greater; the Court of Appeals has discretionary jurisdiction over the remainder of the cases. Presumably that discretion will be guided by an assessment of how substantial the legal issues are that the detainee raises in his petition for review. When reviewing a final decision of a military commission, the D.C. Circuit is authorized to consider "whether the final decision was consistent with the standards and procedures" governing the commission trials and "whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States. This standard may well be construed to import some deferential sufficiency-of-the-evidence review, but it appears to exclude any claims based on treaty rights that have not been incorporated into U.S. law or are not mirrored in any U.S. constitutional protections that would apply to the detainees. Following a decision by the D.C. Circuit, either on the merits or not to review a case, discretionary review by certiorari is thereafter available in the Supreme Court of the United States.

The other relevant provision works in a similar fashion for detainees who have not been charged with war crimes and tried before a military commission but who are instead merely being detained for the duration of the conflict to keep them hors de combat. Such detainees have rights of administrative review within the military system of the factual basis for their detention - i.e., the conclusion that they are enemy combatants fighting against the United States on behalf of militant Islamist terrorist elements. These rights include review of their detentions by the Combatant Status Review Tribunals (CSRTs) and then periodic review and revisitation of the enemy combatant determination by Administrative Review Boards (ARBs). The second jurisdictional provision in the bill, which covers these individuals, is contained in section 6 and provides that section 1005(e)(2) of the DTA sets forth the exclusive means for obtaining judicial review of any claim that would challenge "any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained by the United States" as an enemy combatant. The provision also makes clear that its terms are to apply "without exception" to all actions of this description pending on the date of enactment. This would encompass all of the existing Guantanamo detainee litigation and would overrule the Hamdan decision's holding interpreting the DTA to apply only prospectively.

Section 1005(e)(2), in turn, is quite similar to section 1005(e)(3), providing that the D.C. Circuit has exclusive jurisdiction over detainee appeals from "the final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." The scope of review embraces claims that the CSRT's status determination was inconsistent with the standards and procedures for CSRT proceedings promulgated by the Secretary of Defense or that such standards and procedures are inconsistent with the U.S. Constitution or laws. This portion of the DTA specifically provides that the D.C. Circuit may review the sufficiency of the evidence to ensure that a preponderance of the evidence supports detention, but it, too, appears to exclude any claim based solely on treaty law. Once again, the Supreme Court would retain its ordinary certiorari jurisdiction.

In considering whether there is anything constitutionally problematic about this system, there are two critical overall questions about the Suspension Clause. First, what constitutional right, if any, does it create to habeas corpus for foreign enemies held abroad by our military and intelligence agencies during wartime? Second, assuming such rights exist, what would amount to a suspension?

Before turning to those questions, however, it is critical to recognize as Congress consider this legislation that, if there is a constitutional problem with the DTA procedures, it is already the law.

Because these procedures already apply under the DTA to cases initiated after the DTA, any constitutional infirmity would already exist. Applying the existing procedures to the cases pending before the DTA would not alter the constitutional calculus in any significant way, apart from applying it to more cases. Thus, the decision whether to shrink from this system for constitutional reasons has already been made. That bridge has been crossed. Failing to apply the DTA retroactively would only serve to create a confusing and burdensome disuniformity in the access rights of the detainees. But, as I will now explain, I do not believe that the DTA procedures encroach on any core constitutional habeas corpus right arising under the Suspension Clause.

The scope of the writ

The first task in considering whether the Suspension Clause is violated by the new procedures is to understand the scope of the writ. Unless individuals in the detainees' position, i.e., foreign enemy combatants held abroad in wartime, have a constitutional right to habeas corpus, then the Suspension Clause is simply not implicated, because there is nothing to suspend as to them. In fact, the best reading of current law is that enemy combatants held abroad enjoy no such constitutional habeas corpus rights, and extending habeas corpus privileges to the suspected terrorists at Guantanamo is pure policy choice for the Congress. At least that is so as to detainees whom the United States does not seek to punish through a trial. Although the question whether the Constitution requires judicial review, at least in the minimal form of a petition for a writ of habeas corpus or certiorari to the United States Supreme Court, is a closer one, nothing in the Constitution itself, including the Suspension Clause, confers rights of access to our courts for alien enemy combatants being held in the ordinary course of an armed conflict.

Indeed, there is a respectable argument, based on the original understanding of the Suspension Clause, that the Constitution itself creates no habeas corpus right at all for prisoners of any type in federal custody and that all such rights are entirely a creature of the Congress. No less a critic of the Administration than Professor Erwin Chemerinsky has explained that, "[a]lthough the Constitution prohibits Congress from suspending the writ of habeas corpus except during times of rebellion or invasion, this provision was probably meant to keep Congress from suspending the writ and preventing state courts from releasing individuals who were wrongfully imprisoned. The constitutional provision does not create a right to habeas corpus; rather, federal statutes [do so]." E. Chemerinsky, Federal Jurisdiction 679 (1989) (emphasis in original); see also id. at 683 ("the Constitutional Convention prevented Congress from obstructing the state courts' ability to grant the writ, but did not try to create a federal constitutional right to habeas corpus"); W. Duker, A Constitutional History of Habeas Corpus 135-136 (1980). After all, if the Suspension Clause itself were an affirmative grant of procedural rights to those held in federal custody, there would have been little need for the first Congress to enact, as it did, habeas corpus protections in the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Creation of a constitutional right to habeas corpus had been proposed at the Constitutional Convention but was rejected. The compromise proposal adopted by the Convention and ratified in the Constitution was the current Suspension Clause, which is clearly phrased as a prohibition, rather than as a grant of power or rights. The main fear animating the Framers was based upon

their own experience during colonial times, in which Parliament frequently prohibited the courts of the colonies from granting the writ. They thus sought to ensure that the national government would not, without good cause, bar the courts of general jurisdiction in the several states from issuing writs of habeas corpus. But the powers of the federal courts to issue habeas writs was to be derived wholly from congressional legislation. See Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (judgments about the proper scope of the writ are "normally for Congress to make"); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (confirming that the jurisdiction of federal court to issue writs of habeas corpus is not inherent and that "the power to award the writ by any of the Courts of the United States must be given by written law"). Recent decisions, including Rasul itself, sometimes appear to assume that the Constitution creates some limited right to federal habeas corpus and thus provide reason to question whether the modern Supreme Court would adhere to this originalist view of the Suspension Clause, but it is nonetheless worth noting that there is a respectable body of thought that regards the Suspension Clause as creating no federal constitutional right to habeas corpus at all and leaving the scope of the federal habeas remedy entirely to the Congress. On this view, of course, there could be nothing wrong at all with the procedures for judicial review of foreign terrorist detentions erected in the DTA.

Even if the Suspension Clause were, however, construed to create some constitutionally-guaranteed minimum habeas right, there is every reason to believe that the core habeas remedy would not include a right of access to our courts for alien enemy combatants held abroad by our military in wartime. It is important not to confuse statutory habeas rights, which can be altered, amended, or limited by the Congress that created them, and the constitutional minimum which Congress would be prohibited from altering. Rasul dealt only with the former, as the decision itself makes clear. See Rasul, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").1 As to the latter, there is a clear holding of the United States Supreme Court, which has never been questioned or undermined, and has indeed been repeatedly and recently reaffirmed, that aliens held in military custody outside our shores are not protected by the rights granted "we the people" under the Constitution.

In Johnson v. Eisentrager, 339 U.S. 763 (1950), the Court held that the Suspension Clause does not give aliens held abroad any constitutional right to habeas corpus relief. The same case made clear that aliens held abroad also enjoy no Fifth Amendment protections. See id. at 784-85 ("extraterritorial application of organic law" to aliens would be inconceivable). The notion that constitutional rights do not attach to aliens outside our country was reaffirmed in recent years in cases such as United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), and Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Only when an alien comes within our territory or establishes some sort of meaningful connection to the United States do the protections of our constitution begin to attach. Needless to say, planning to kill our civilians in mass terror attacks generally does not qualify as a meaningful connection for constitutional purposes. As Justice Jackson noted in Eisentrager, "it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders." Eisentrager, 339 U.S. at 775.

1 Rasul held only that the predicate for the statutory holding in Eisentrager had been overruled sub silentio in Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973). It based its ruling on an interpretation of the term "within their respective jurisdiction" in 28 U.S.C. § 2241, and it expressly distinguished between the statutory holdings and constitutional holdings in Eisentrager, limiting its ruling only to the statutory holding.

2 The procedural holdings of the plurality in Hamdi represent the law of the land, as Justice

Thomas dissented on a ground that would give the government greater latitude to detain enemy combatants and therefore would necessarily constitute a fifth vote for the constitutionality of the more protective procedures ordained by the plurality.

Eisentrager's holding regarding the reach of habeas corpus rights accords with a common sense interpretation of the language of the Suspension Clause. That clause states that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I sec. 9, cl. 2. The two instances in which suspension is permitted under the clause - rebellion and invasion - both contemplate a physical threat to public safety inside the United States. The focus of the clause is domestic. If the writ is to be suspended, the Framers appear to contemplate that it would be suspended as to individuals found inside the United States. The notion that the writ spans the globe does not sit comfortably with the words of the Suspension Clause itself.

Moreover, Rasul itself indirectly supports the notion that habeas corpus rights for alien enemy combatants held on foreign soil are not part of any constitutional habeas right. Rasul expressly recognized Eisentrager's statutory holding that habeas corpus rights did not extend to aliens held abroad and distinguished it from Eisentrager's constitutional holding. The Rasul majority held that Eisentrager's statutory holding was fatally undermined by the claimed overruling of Ahrens v. Clark, 335 U.S. 188 (1948), in 1973 in Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), see Rasul, 542 U.S. 466, 476-79 (2004), and the Rasul dissenters (rightly in my view) held that this statutory ruling had not been overruled until the decision in Rasul itself. Rasul, 542 U.S. 466, 476-79 (2004). The Court thus did not question that those rulings were correct until recently. It also did not question Eisentrager's holding that the Constitution did not afford habeas rights to enemy aliens abroad. If there were a constitutional right to habeas corpus relief for alien enemies held abroad, the implication would thus be that it sprang into existence some time after 1973, if not just two years ago in 2004, and received no mention in Rasul. No matter how robust a concept of the "living Constitution" one embraces, this sort of Miracle-Gro Constitution cannot fit within it.

In the specific context of alien enemy combatants, the Eisentrager Court explained that, if the Constitution conferred rights on foreign enemy combatants, "enemy elements . . . could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, the right to bear arms as in the Second, security against 'unreasonable searches and seizures' as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." Eisentrager, 339 U.S. at 784. If the Constitution were meant to extend its protections to foreign enemies - which would have been a truly radical concept at the time of adoption when the U.S. was threatened constantly with external invasion, and national survival and providing for the common defense was a central object of government and the Constitution that created it - "it could scarcely have failed to excite contemporary comment," yet, the Court observed, "[n]ot one word can be cited," and "[n]o decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it." Id.

And no wonder. The Constitution was designed to restrain the power of our government as regards our own citizens or those under our country's protection. But it had the opposite purpose with respect to our nation's enemies. As to our military adversaries, the Constitution was meant to empower, not restrain, our government. With the experience of the Revolution in mind, where structural weaknesses in government had near-fatal consequences, the Framers of the Constitution sought to ensure that the new nation could effectively protect itself against external

enemies and thus fulfill one of the Constitution's great purposes, stated in the preamble: "to provide for the common defence."

A constitutional requirement, deriving from the Suspension Clause, that alien enemies abroad would under all circumstances have recourse to our courts to challenge their detentions would have been entirely inconsistent with this great goal, which remains as important today as it was then. As Justice Jackson observed in Eisentrager, furnishing habeas corpus rights to enemy combatants abroad "would hamper the war effort and bring aid and comfort to the enemy. [Habeas corpus proceedings] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." Eisentrager, 339 U.S. at 779. The wisdom of the Supreme Court's pronouncement in 1950 has been amply borne out by our experience with the Guantanamo litigation, and the old common sense and practical appreciation for the imperatives of wartime that informed it seem increasingly difficult to come by.

From a practical perspective, if the Constitution mandated habeas corpus for alien enemies held abroad, what would stop the thousands of insurgents being held in Iraq and Afghanistan from suing? And if some latent guarantee of habeas corpus lurking in the Suspension Clause could apply to alien enemies abroad, then why not other fundamental constitutional guarantees, such as Due Process? If the Due Process Clause applied to aliens in foreign countries, then why would there not be a violation of those aliens' constitutional rights every time a bomb was dropped in error? Why would not every innocent person injured, killed, or deprived of property in military operations be able to sue the United States? After all, there is no such concept as "collateral damage" when it comes to those whom our Constitution protects.

Put simply, the conduct of warfare against foreign enemies would impossible if our Constitution protected them as it does us. The values of civilization and human rights are not served by affording rights under the U.S. Constitution to our enemies; those values are served by vigorously and effectively defending our society and our liberties against those who would destroy both. As the Supreme Court recently observed, accepting the claim that aliens abroad enjoy federal constitutional protections "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Verdugo-Urquidez, 494 U.S. at 273.

If there is a habeas corpus right at the constitutional core of the Suspension Clause, it almost certainly does not extend so far as to cover foreign fighters captured and held abroad by our military and intelligence services. Indeed, the Supreme Court has already so held. No principle of law or justice requires a contrary conclusion. Although the Congress may, in its exercise of policy judgment, and sensitive to the role that public and international perception play in the effectiveness of our war effort, elect to afford statutory judicial review rights to enemy combatants held at Guantanamo or elsewhere, it would be a grave mistake to conclude that the Constitution compels the Congress to do so. The Constitution permits Congress to experiment in this area with the measures that best serve our policy objectives and further our national security. It does not shackle the political branches of government in meeting foreign threats by requiring rights of judicial review in wartime that not only were completely unknown at the time of the founding but remain so in most of the rest of the world even today.

Suspension of the writ?

Even if the Suspension Clause applied to foreign enemy combatants held abroad, it is highly unlikely that the procedural protections in the DTA would be held to violate that clause. Put simply, the DTA regime respects whatever constitutional habeas corpus rights a foreign fighter could be thought to have. It provides for meaningful judicial review of the legality of the Guantanamo detentions. The writ is not suspended by the DTA; if anything, it is extended.

The office of the Great Writ is to test the legality of detention through judicial review; it is not an all-purpose vehicle to redress any conceivable legal wrong. It is a flexible and supple remedy that has been repeatedly adjusted and changed through both judicial decisions and Acts of Congress. See, e.g., Felker v. Turpin, 518 U.S. 651, 664 (1996) (significant habeas restrictions even as to prisoners in civilian custody inside the United States do not effect an unconstitutional suspension, recognizing that "evolutionary process" of adjustments to the scope of the writ do not generally amount to suspensions). And neither remedial labels nor the precise courts exercising jurisdiction matter: as long as there is some court available to decide whether a detention comports with the Constitution and laws of the United States, the writ has been preserved, not suspended.

Thus, the Supreme Court has stated that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." Swain v. Pressley, 430 U.S. 372, 381 (1977). And it has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals." INS v. St. Cyr, 533 U.S. 289, 314 & n.38 (2001).

That is precisely what Congress has done in section 1005 of the DTA, which the pending bill would apply to all existing Guantanamo detainee litigation. The DTA procedures provide for a federal court of appeals to review the executive branch determinations that the suspected terrorists at Guantanamo are enemy combatants subject to detention under the laws of armed conflict. The court is specifically empowered to ensure that the applicable administrative procedures and standards for combatant status review have been followed and that those procedures and standards comport with federal constitutional and statutory norms. The court is also directed to ensure that the executive determinations are supported by a preponderance of the evidence. Although this review does not track in every particular the specific contours of the statutory habeas right, it does not need to. This is robust, meaningful review of the legality of detention, and it is difficult to see how it could be so "inadequate" or "ineffective" as to constitute a suspension of any core habeas right secured by the Constitution to our military foes.

To be sure, the DTA review in the D.C. Circuit does not entail de novo evidentiary hearings or judicial factfinding. But neither do many habeas corpus proceedings in federal district court. In the ordinary habeas context, even as applied to U.S. citizens convicted of crime in a state court, review of factual sufficiency is highly deferential. Jackson v. Virginia, 443 U.S. 307, 320-24 (1979). Indeed, the traditional rule on habeas corpus review of non-criminal executive detentions was that "the courts did generally did not review the factual determinations made by the executive." St. Cyr, 533 U.S. at 27. Most petitions for collateral relief by federal prisoners under 28 U.S.C. § 2255 are resolved without any form of evidentiary hearing. And in the context of military detentions and trials, the established rules currently recognized by the Supreme Court are even more limited, providing for judicial review of legal issues and commission jurisdiction

but no review at all of factual questions of guilt or innocence. See, e.g., Ex parte Quirin, 317 U.S. 1, 25 (1942); Yamashita v. Styer, 327 U.S. 1 (1946). The kind of quasi-administrative record review provided for by the DTA has ample precedent in contexts as diverse as habeas corpus review of selective service and immigration decisions. See, e.g., St. Cyr, 533 U.S. at 305-06; Cox v. United States, 332 U.S. 442, 448-49 (1947); Eagles v. United States ex rel. Samuels, 329 U.S. 304, 312 (1946). In those contexts, significant deprivations of liberty have been reviewed and upheld on habeas corpus review as long as there is some reasonable quantum of evidence to support an otherwise lawful executive decision. The Supreme Court has never implied that this form of habeas corpus review amounts to a suspension of the writ. Nor do I believe it would do so here.

The suggestion that the Constitution gives suspected foreign terrorists held at Guantanamo extensive rights to searching factual review in district court also cannot be reconciled with Hamdi v. Rumsfeld, 542 U.S. 507 (2004), which addressed the extent of the due process to which an American citizen detained militarily in the current war was entitled. The Court concluded that even U.S. citizens are only entitled to notice and a meaningful opportunity to contest the factual basis for their detentions before a neutral decisionmaker. See id. at 533 (plurality opinion).2 The Hamdi court noted that "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." Id. at 533. In that regard, the Court noted that such procedural innovations as the use of hearsay or the erection of a presumption in favor of the government's evidence would not offend the Constitution. See id. at 533-34. Significantly, Justice O'Connor specifically noted that "an appropriately authorized and properly constituted military tribunal" might permissibly serve the adjudicative function contemplated and make enemy combatant determinations - again, even as to United States citizens who might be detained. Id. at 538 (plurality opinion). That is precisely what the CSRTs do, and the provision of meaningful judicial review of the CSRTs' determinations are a further guarantee of legality and regularity. In my judgment, it is unlikely that the courts would conclude the Congress is constitutionally required to provide more.

Power to suspend the writ as to alien enemy combatants following the 9/11 attacks

In any event, the debate over whether the pending bill, and the DTA standards it incorporates, would effect a suspension of the writ may be somewhat academic. That is because Congress is expressly permitted to suspend the writ in certain circumstances. Not every suspension of the writ is unlawful. On the contrary, the Suspension Clause specifically recognizes that Congress is permitted to suspend the writ when in cases of rebellion or invasion the public safety may require its curtailment. Even if it were the case that the Suspension Clause vests alien enemy combatants held abroad with constitutional habeas rights that would be infringed by the DTA procedures, there would be a strong argument that such infringements would not exceed Congress's powers or themselves violate the Constitution.

The attacks on September 11 constituted a literal invasion of this country by a ruthless enemy. Our financial center was attacked; the headquarters of our military was attacked; and an attempt was made to attack the seat of our government. All of this was accomplished by enemy combatants who entered our territory surreptitiously and planned and executed their attacks from our soil. The horrific loss of innocent life resulting from those attacks amply demonstrates the danger to public safety presented by al Qaeda's invasion. It would seem reasonable that, at least

if Congress made the necessary findings, its power under the Suspension Clause to limit application of the writ would be triggered. And the pending bill enacts such a narrowly tailored limitation of the relevant procedural rights and remedies - applying only to suspected foreign enemy combatants held outside the United States and affording even such persons a meaningful opportunity to contest their detentions - that it seems unlikely a court would conclude that Congress had exceeded or abused that power.

Moreover, it may not even be necessary to conclude that the 9/11 attacks constituted an "invasion" in order for Congress to be vested with its suspension power. Only a slightly less strict construction of the Suspension Clause, which interpreted it in a manner consistent with its evident purposes, would suggest that Congress has the power to suspend the writ when an external threat genuinely imperils public safety within the United States. Again, under this view, at least with appropriate findings and narrow tailoring of the limitations on judicial review, Congress's approach in the pending legislation should be within its power.

* * * *

All freedom-loving people cherish the Great Writ. But we debase that writ, rather than honor it, if we extend it into realms where neither history nor tradition support its use. The writ of habeas corpus is undermined, not strengthened, when it is used to afford new procedural rights to captured enemy fighters who would, if we allow them to, jettison the Magna Carta and everything that came after it in favor of the Koran. Our enemies have nothing but contempt for Anglo-American civil liberties. It is up to the Congress to decide as a matter of policy how many of those liberties we wish to extend to those enemies; the Constitution itself does not protect them, at least when they are detained abroad in the ordinary course of military operations. Certainly nothing in the Suspension Clause requires Congress to afford alien military detainees access to our domestic courts.

In closing, I wish to thank the Committee for the opportunity to address this important issue. The Committee's concern with preserving and protecting the writ of habeas corpus is laudable. I hope I have been able to clarify that the decision how to do so in this context rests with the Congress as a policy matter and is almost certainly unconstrained by the Suspension Clause. I would be glad to answer any questions the Committee may have.

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