



U.S. SHOULD RESTORE RIGHTS FOR DETAINEES

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The elimination of certain habeas corpus rights by the Military Commissions Act last year was widely denounced by liberals and conservatives alike as unwarranted, illegal or both.

The act raised significant constitutional concerns that are being explored in the halls of Congress, the courts and the press. Such constitutional questions are important and should be answered purposefully and carefully.

Our concern in writing goes beyond the constitutionality of this specific law. Simply put, the Military Commissions Act's repeal of habeas corpus, whatever its constitutional status, is bad foreign policy. Members of Congress from both sides of the aisle should support the immediate restoration of habeas corpus rights to the detainees held at Guantánamo Bay, Cuba, and elsewhere.

Restoration of this fundamental right would regain the moral high ground for the United States, protect the well-being of our soldiers and provide international legitimacy for detentions during the "war on terrorism."

When Congress stripped "enemy combatants" of their habeas corpus rights, it drastically limited the ability of the U.S. military to detain and properly process enemy combatants. Meaningful judicial review of detention is essential to separate those detainees who are dangerous and rightly being held from those detainees who were simply in the wrong place at the wrong time.

Our country's labors — as well as financial and strategic resources — are misapplied when we ask well-trained and well-armed soldiers to guard both the wheat and the chaff. In wars between uniformed armies, recognition of the enemy is usually just a matter of recognizing a flag. We now find ourselves in a war without uniforms, flags or even set battlefields. Identifying those prisoners who are actual threats, and whom we need to detain and are entitled to detain, is thus significantly more difficult. We should take advantage of the courts' expertise and time-tested rules of procedure in performing this task.

Even though few of the people we are detaining were traditional soldiers, the international laws of war and Common Article 3 of the Geneva Conventions still apply. By denying habeas to prisoners and circumventing our



international legal obligations, we regrettably encourage our adversaries to do the same.

We do not contend that restoring habeas corpus for detainees will persuade al-Qaida militants to treat captured American soldiers with the same respect; al-Qaida and similar terrorist groups have no such scruples. But we do believe that demonstrating disregard for our own democratic rule of law is counterproductive during a prolonged and public campaign to promote democracy and the rule of law around the globe.

As such, it threatens our own national interest by creating a precedent that jeopardizes the safety and well-being of our soldiers serving in Iraq and Afghanistan, as well as in conflicts yet to come.

Our success in modern warfare depends a great deal on the perceived legitimacy of our cause. That legitimacy is weakened by removing detainees from the normal judicial process. Such treatment is ill-advised. There is no profit — strategic or legal — in denying our military the ability to obtain the stamp of approval from an American court on its decision of whom to detain.

Once a court has heard a habeas petition and found that the detainee is rightly being held, there can be no doubt of our commitment to both justice and security. When Guantánamo Bay is being used by al-Qaida as a recruiting tool and even our allies find our detention methods objectionable, our process for determining whom to hold there must be beyond reproach.

There is no question that the Military Commissions Act has reduced the ability of our armed forces to effectively combat the terrorists who threaten our national security. This is why we have joined the Constitution Project's Coalition to Defend Checks and Balances — a bipartisan group of policy experts, legal scholars and former government officials — in calling for the immediate restoration of habeas.

We have served under presidents of both parties in the past five administrations and believe that foreign policy is not the place for partisan politics.

Though many well-intentioned members of Congress supported the Military Commissions Act's repeal of habeas corpus rights in 2006, they now have a chance to reconsider. We urge those U.S. senators to join the bipartisan movement to restore habeas corpus led by Sens. Arlen Specter, R-Pa., and Patrick Leahy, D-Vt., and to co-sponsor the Habeas Corpus Restoration Act.

Liberty and security do not stand mutually opposed. On the contrary, they are mutually dependent. We must demand that our government protect both.