

MILITARY COMMISSIONS ACT OF 2006
Statement of Senator Dick Durbin
September 27, 2006

Mr. President, I rise to speak about the Military Commissions Act of 2006 which the Senate is likely to consider, possibly today, certainly this week.

For those who have been following it, the debate in Washington the last few weeks has been very interesting. It has now been 5 years since the attacks of 9/11. The present administration has finally come forward and asked Congress to pass a bill authorizing military trials to try suspected terrorists. At this late date, the President is demanding the Congress act immediately after the Administration waited 5 years to come to Congress.

It is welcome news that the President is now working with the Congress to bring the planners of 9/11 to justice. Why do we have to do it today? Why do we have to do it this week?

For some of us who have served in the Senate for a while, this reminds us of a debate that took place 4 years ago. Four years ago this Congress was told that before we could return home to face the November elections, we absolutely without fail had to vote on the question of authorizing the use of military force and giving the President the authority to invade Iraq. We were told there was a timetable that had to be met; that there was no time to spare.

Despite the fact that we had limited information about the situation in Iraq, despite the fact that we had only vague assurances from the President that he would use diplomacy before he ever considered military action, despite the fact that we didn't have a coalition of allies or forces, we were told the decision had to be made. It had to be made in October, before an election.

I recall it very well because I was up for reelection. Many of us were told: If you vote wrong on this one, you may not be reelected. It wasn't an easy vote. The toughest vote any Member of Congress can face is a vote for going to war. On that vote there were 23 Members of Congress who voted no -- 1 Republican, 22 Democrats -- and I was one of that number. I look back on it now as the right vote. I have heard many Senators who voted to go to war that day who have said: We made a mistake. I salute their courage for standing up and admitting that. I have yet to find a single Senator who voted against that war who has said the same.

Now we are being told, less than 2 months before another election, we absolutely have to have a vote this week on a -- secure fence, they call it. See if you can catch the flaw in the logic.

The proposal is to build a 700-mile fence on the Mexican border, which is 2,000 miles long. Do you catch the flaw in this logic? Is it possible that those determined to come into the United States might go around the fence? Over it? Under it? This 700-mile fence is a 19th or early 20th century answer to a 21st century challenge. It has now become a question of political bragging rights. Which party has the longest fence to take to the American voters? Is that the best we can do on Capitol Hill?

I might add, this underlying bill says it is about time we get serious about building a fence between Canada and the United States -- thousands of miles. I try to envision this, what we are talking about. The 700-mile fence on the southern border is the equivalent of a fence from the Washington Monument in the Nation's Capitol to the Sears Tower in Chicago -- a fence of 700 miles.

We can argue the merits or demerits of this issue, but it is clear what it is all about. It is an effort to have a political vote as close to the election as possible. It is an effort to tap into voter sentiment on the issue of immigration. It is an effort to avoid our real responsibility, and that is to demand smart enforcement -- tough enforcement at the border, and enforcement in the workplace so that those who are drawn to America to find a job will be discouraged because now there will be a tamper-proof ID to establish who a person really is before they have a chance to work in this country.

It is also ignoring the obvious, too. We need agricultural workers immediately. The crops, the fruit and produce, are rotting right now in many States such as California because the workers are not permitted to come here. That is not good for the growers, of course. It is certainly not good for America. But it is a fact.

We also face another reality. There are 10 to 12 million people here today who are undocumented. I know many of them in my city of Chicago, which I am honored to represent. Many come forward to talk about the challenges they face with current immigration laws, which are almost impossible to understand. Instead of looking at the whole picture and having an honest answer, even if it isn't that popular, the Republican leadership has decided that before we get out of town we are going to vote on a 700-mile fence, on the Mexican border and a study of a fence along the Canadian border. It tells you where we are politically.

The second part of this bill is not much different. It is an effort, I am afraid, by many political strategists, to create a political wedge issue, a replay of what we faced 4 years ago with the vote on authorizing the President to invade Iraq. The reality is that the Congress has stood ready to create commissions to try terrorists for a long time. It was 2002, when Senator Arlen Specter, Republican of Pennsylvania, now chairman of the Judiciary Committee, came to me and asked me to cosponsor bipartisan legislation to authorize military commissions, and I did. The understanding was we should have commissions that are consistent with the rule of law and our constitutional values. That was 4 years ago. Nothing has happened, from the administration or in Congress. Now we are told we can't wait another day.

Instead of working with Congress, the President unilaterally created military commissions that are inconsistent with American values and the law. It was no surprise when the Supreme Court ruled in the *Hamdan* decision this administration's military commissions were illegal.

After the *Hamdan* decision, I had hoped that we could work with the administration by charting a new course, a bipartisan course, as we did with so many other things. When it came to the creation of the PATRIOT Act, it was a bipartisan effort after 9/11. When it came to reforming our intelligence agency, it was bipartisan. But, unfortunately, this effort has not been

bipartisan. Instead, the Administration initially demanded that Congress pass a law simply ratifying the approach that the Supreme Court has already rejected. The Republican leadership of Congress rushed to rubberstamp the President's proposal.

We need to create military commissions so those who are guilty of terrorism and war crimes can be held accountable. But we need to do it in a way that will meet the test of the body right across the street, the U.S. Supreme Court. They will ultimately look at our product and decide whether it meets constitutional muster. If the Court rejects these new military commissions, justice for the victims of 9/11 will be delayed yet again.

It is fortunate that under the leadership of Chairman John Warner and ranking member Carl Levin, the Senate Armed Services Committee took a hard look at this issue and produced bipartisan legislation that is vastly superior to the bill proposed by the administration. It is disappointing, but not surprising, that the White House and Republican leadership of the Senate did not accept the Armed Services Committee bill. I am afraid that was our last best hope for a bipartisan effort. But perhaps many of them do not want a bipartisan bill. Many of those strategists want a partisan issue.

It is more important that the protection of America be done on a bipartisan basis and a sensible basis than that we posture in these last few moments before an election to try to win some advantage in the polls.

I want to salute a number of Republican Senators, one of whom is presiding at this moment, for their leadership on this issue: Senator John Warner of Virginia, Senator John McCain of Arizona, and Senator Lindsey Graham of South Carolina, who is presiding. Senator Warner is a World War II vet and former Secretary of the Navy; John McCain, Vietnam, a Vietnam vet, former prisoner of war; Lindsay Graham, who was a judge advocate in the Air Force Reserves and is the only Senator currently serving in the National Guard or Reserves.

They spoke out, and I am sure they took some heat for saying the administration's proposal was not good enough. The chorus behind them was a strong one. General Colin Powell stepped forward and said the administration's proposal did not meet the moral test of a country that wants to fight terrorism on a global basis. He was joined by General Vessey and General Shalikashvili and other military leaders who were equally critical.

Thanks to their efforts, the bill we will consider is better than it otherwise would have been. For example, the bill would make it a crime to use abusive interrogation techniques like waterboarding, induced hypothermia, painful stress positions, and prolonged sleep deprivation.

What it comes down to is this: How will we treat detainees and prisoners? Is there a limit to what we can or should do? Will the Geneva Conventions work? This administration, the Bush administration, said a few years ago they were quaint and obsolete in a war against terrorism. Thank goodness that point of view is no longer acceptable.

President Bush says he has one test for this legislation: Will it allow the administration's secret prisons and coercive interrogation techniques to continue?

Of course we must detain and aggressively interrogate suspected terrorists. We live in a dangerous world. There are people in this world who wish us ill. We learned it on 9/11. We learned it in countries around the world, that these are people who cannot be trifled with. They must be taken seriously, and I would not support any legislation that prevented our military or intelligence investigators from asking the hard questions of those they have detained.

But there are other tests we have to apply as well. First, is the legislation we are about to pass consistent with American values and law? What makes us better than the terrorists is that there are some lines we won't cross, even in war. I believe we can fight terrorism effectively and stay true to our Constitution.

Just as important: Will this legislation put our own troops at risk or make it more difficult to fight the war on terror. As dozens of military leaders have argued in recent weeks, this is not the last war we will fight, and the standards we set today for the treatment of detainees and prisoners will determine how our brave soldiers will be treated in this and future wars.

Despite the great efforts of Senators Warner, McCain, and Graham, I am concerned that provisions in the bill that will come before us do not meet these tests.

Let's take one example. The bill would revise a law known as the War Crimes Act to give Bush administration officials and those who preceded them, back to 1997, amnesty, amnesty for authorizing illegal interrogation techniques.

Think about this for a second. This administration wrote a memo. The author of that memo is a gentleman who is now before us as a potential nominee for the Federal court. In that memo it was recommended that we might use, as part of interrogation techniques, using dogs to threaten and intimidate prisoners. That was in the memo.

Now, fast forward to Abu Ghraib and to those awful, horrific photographs we saw of the treatment of prisoners in that jail. You will recall, as I do, one of our soldiers holding on a leash a dog that was growling at one of the prisoners. That soldier is in jail today for using that dog and using that technique. The person who wrote the memo suggesting the use of dogs as an interrogation technique is not only facing no questioning, but the administration is proposing he be given a lifetime appointment to the second highest court in the land.

Where is the justice, when soldiers who use these techniques, as wrong as they are, end up in prison, and those who write the memos suggesting these techniques not only are not held accountable, they are rewarded? And now we are presented with this bill, which says we will give amnesty to those who conceived of these interrogation techniques.

Over 4 years ago, then-White House Counsel Alberto Gonzales recommended to the President that the Geneva Convention should not apply to the war on terrorism. In a January 2002 memo to the President, Mr. Gonzales concluded the war on terrorism "renders obsolete" the Geneva Conventions. Think of that. The Geneva Conventions, international agreements that have guided America for more than a century, were obsolete, we were told by the White House Counsel at that time, Mr. Gonzales.

In his memo to President Bush, Mr. Gonzales specifically warned that administration officials could be prosecuted under the War Crimes Act if the President did not set aside the Geneva Conventions. He argued that a presidential determination that the Geneva Conventions do not apply would “substantially reduce the threat of domestic criminal prosecution under the War Crimes Act” and “would provide a solid defense to any future prosecution.”

It was during that period of redefining conduct that some terrible memos and terrible standards were generated by this administration, standards which led to some of our soldiers being imprisoned. Now this bill would say that the authors of those terrible standards cannot be held accountable.

General Colin Powell, who was Secretary of State at the time, strongly disagreed with the recommendation to set aside the Geneva Conventions. He had decades of military experience informing his judgment. He argued that complying with the Geneva Conventions and effectively fighting the war on terrorism were not only possible, it was the course America should follow. In a memo to Mr. Gonzales, Secretary Colin Powell concluded that setting aside the Geneva Conventions, “will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our own troops. ... It will undermine public support among critical allies, making military cooperation more difficult to sustain.”

Now look at what happened in the 4 years that followed. From Washington DC, to Guantanamo, to Abu Ghraib, damage has been done to America's image. It is clear that Secretary Colin Powell was right. Unfortunately, the President rejected his wise counsel. In February 2002 the President issued a memo directing that the Geneva Conventions would not apply to the war on terrorism.

Just this summer, in the *Hamdan* case, the Supreme Court ruled that the President's position on the Geneva Conventions is illegal. The Supreme Court reminded the President and all of us that we are a nation of laws, even in a time of war.

Now, 4 years after Gonzales warned President Bush about possible prosecutions under the War Crimes Act, the administration wants an amnesty, retroactive immunity for their actions. According to a recent *Washington Post* story, Alberto Gonzales told Republican Members of Congress, “a shield is needed for actions taken by U.S. personnel under a 2002 Presidential order which the Supreme Court declared illegal.”

One reason the White House may be pushing for amnesty is because high-ranking administration officials have authorized the use of several controversial interrogation techniques that appear to violate the law. In late 2002, relying on the President's decision to set aside the Geneva Conventions, Defense Secretary Rumsfeld approved numerous interrogation tactics for use at Guantanamo. The commander of Guantanamo Bay's detention operations gave the Guantanamo policies to senior officers in Iraq, and they became the bedrock for interrogation tactics in Iraq, according to the Department of Defense's own investigation. The horrible images that emerged from Abu Ghraib have seared into our mind the nature of some of these techniques,

including threatening detainees with dogs and forcing detainees into painful stress positions for long periods of time.

When other countries have used these techniques throughout modern history, the United States, through our State Department, has condemned them as torture. In a memo that has been publicly released, the Federal Bureau of Investigation concluded that the techniques authorized by the Defense Secretary but “are not permitted by the U.S. Constitution.”

Senior military lawyers, known as Judge Advocates General, have also raised serious concerns. To take just one example, in a recent hearing of the Senate Armed Services Committee, MG Jack Rives, the Air Force JAG, said “some of the techniques that have been authorized and used in the past have violated Common Article 3” of the Geneva Conventions.

These are not human rights groups, partisans, or journalists. This is our own State Department, our FBI, and military lawyers saying the administration has authorized interrogation techniques that violate the law.

And who will accept responsibility for these mistakes? The soldiers. The soldiers will go to jail. But if this bill passes, those who sent out the memos will be off the hook. So while the administration claims they want to do right by the victims of 9/11 and our brave men and women in uniform, it appears that they are not doing what justice requires.

This amnesty will protect someone else. Sadly, it will also protect those who commit war crimes against Americans. Let's not forget the original intent of the War Crimes Act, enacted in 1996 by a Republican-controlled Congress, adopted by a voice vote in the House and a unanimous vote in the Senate. Conservative Republican Congressman Walter Jones proposed it after he met with a retired Navy pilot who spent 6 years in the Hanoi Hilton, the same Vietnamese prison where Senator John McCain was detained. Congressman Jones wanted to give the Justice Department the authority to prosecute war criminals like the Vietcong who abused American POWs.

Here is what Senator Jesse Helms, a leading conservative on the Republican side of the aisle, said of the War Crimes Act: “This bill will help to close major gaps in our Federal criminal law by permitting American servicemen and nationals, who were victims of war crimes, to see the criminals brought to justice in the United States.”

So keep in mind that if we water down the War Crimes Act to immunize American government officials, we also make it harder to prosecute war criminals who abuse Americans.

There is another very troubling provision in this legislation. It would eliminate the writ of habeas corpus for detainees. Habeas corpus is a Latin phrase that means “you have the body.” It is the name for the procedure that allows a prisoner to challenge his detention.

Over 700 lawyers from Chicago sent me a letter strongly opposing the elimination of habeas corpus for detainees. Here is how they explained the importance of habeas corpus:

The right of habeas corpus was enshrined in the Constitution by our Founding Fathers as the means by which anyone who is detained by the Executive may challenge the lawfulness of his detention. It is a vital part of our system of “checks and balances” and an important safeguard against mistakes which can be made even by the best intentioned government officials.

To a non-lawyer, habeas corpus may sound like an abstract legal principle, but eliminating it would have practical and very damaging consequences: it would prevent courts from reviewing the lawfulness of the Administration’s detention and interrogation practices. This is yet another form of amnesty for the Administration.

Why is the Administration so interested in protecting itself from judicial review? Perhaps it is because the courts have repeatedly ruled that the administration’s policies violate the law.

After the September 11th terrorist attacks, the Administration unilaterally created a new detention policy. They claimed the right to seize anyone, including an American citizen in the United States, and to hold him until the end of the war on terrorism, whenever that may be.

They claimed that even an American citizen who is detained has no rights. That means no right to challenge his detention, no right to see the evidence against him, and no right even to know why he is being held. In fact, an Administration lawyer claimed in court that detainees would have no right to challenge their detentions even if they were being tortured or summarily executed.

Using their new detention policy, the Administration has detained thousands of individuals in secret detention centers around the world. While it is the most well-known, Guantanamo Bay is only one of these detention centers. Many have been captured in Afghanistan and Iraq, but people who never raised arms against us have been taken prisoner far from the battlefield, in places like Bosnia and Thailand.

Who are the detainees in Guantanamo Bay? Back in 2002, Defense Secretary Rumsfeld described them as “the hardest of the hard core” and “among the most dangerous, best trained, vicious killers on the face of the Earth.” However, the Administration has since released hundreds of the detainees and it now appears that Secretary Rumsfeld’s assertion was false.

According to media reports, military sources indicate that many detainees have no connection to Al Qaeda or the Taliban and were sent to Guantanamo over the objections of intelligence personnel who recommended they be released. One military officer said, “We’re basically condemning these guys to long-term imprisonment. If they weren’t terrorists before, they certainly could be now.”

I recall visiting Guantanamo recently where Admiral Harry Harris said to me -- I asked him about the prisoners there. He said, “They are not being punished -- they are only being detained.”

They haven't been charged with anything -- and that is the point. Habeas corpus allows these people being held for years to ask why they are being held. They are not automatically released, but under habeas corpus they can ask: On what basis are you keeping me as a prisoner?

I hope my colleagues will stop and think about this for a moment. If there is a dangerous person in Guantanamo who threatens an American soldier or any American citizens with an act of terrorism, if they have been complicit in any act of terrorism involving al-Qaida or Taliban, from my point of view they should be incarcerated and held until there is no danger to the United States. But if we are simply holding 455 people with no charges, indefinitely, and no right to challenge the basis for their detention, until this war on terrorism, which has no definable end to it, comes to an end, that is not consistent with the principle of justice.

In 2004, in the landmark decision of *Rasul v. Bush*, the Supreme Court rejected the administration's detention policy. The Court held that detainees can file habeas corpus claims in court to ask why they are being detained.

Rather than changing their policies to comply with the Court's decision, the administration has asked the Republican-controlled Congress to change the law to eliminate habeas corpus for detainees. This would overturn the Court's decision in *Rasul v. Bush* and immunize the administration's detention policies from judicial review.

Tom Sullivan is a prominent attorney in Chicago and a friend of mine. Tom served in the Army during the Korean War. He is a former U.S. Attorney. On a pro bono basis, he and his law partner Jeff Colman have taken on the cases of several Guantanamo detainees. Tom says that his clients were not detained on the battlefield and that they are not even accused of engaging in hostilities against the United States. He believes they are innocent and are in Guantanamo because of mistakes that were made in the fog of war. Tom has been a lawyer for more than 50 years. He believes habeas corpus is the bedrock of the American legal system because it is the only recourse available when the government has mistakenly detained an innocent person.

Admiral John Hutson was a Navy judge advocate for 28 years. Admiral Hutson testified on Monday at a Senate Judiciary Committee hearing. Here is what he said about eliminating habeas for detainees:

It is inconsistent with our own history and tradition to take this action. If we diminish or tarnish our values, those values that the Founders fought for and memorialized in the Constitution and have been carefully preserved by the blood and honor of succeeding generations, then we will have lost a major battle in the war on terror ... We don't need to do this. America is too strong. Our system of justice is too sacred to tinker with in this way.

Admiral Hutson also testified that eliminating habeas will put our own troops at risk:

If we fail to provide a reasonable judicial avenue to consider detention, other countries will feel justified in doing the same thing. ... It is U.S. troops who are forward deployed in

greater numbers and on more occasions than all other nations combined. It is our troops who are in harm's way and deserve judicial protections. In future wars, we will want to ensure that our troops and those of our allies are treated in a manner similar to how we treat our enemies. We are now setting the standard for that treatment.

When I visited the detention facility at Guantanamo, I saw American soldiers doing their duty in a very bleak and desolate spot. I salute them for serving their country. Every day they wake up, put on the uniform of the United States and serve us with honor and distinction. Congress should not do anything to make their job more difficult.

We should not have a double standard where our brave men and women in uniform go to jail and high-ranking political appointees are not held accountable. What kind of message does that send to our soldiers?

If we eliminate habeas corpus for detainees at Guantanamo, we will put our troops in the impossible position of serving as jailers for men who are indefinitely detained with no ability to challenge their detention. Think about that for a moment. If there were an American employee or an American citizen or an American soldier being held in a foreign place with no charges against them, indefinitely, with no recourse under the law, we would be protesting in the strongest terms.

The American people want us to bring the planners of 9/11 to justice. That should be the focus of our legislation, not giving amnesty to administration officials and not immunizing the administration's policies from judicial review.

These provisions fail two crucial tests. They are inconsistent with American values, and they would put our troops at risk. They must be changed.

I look forward to the consideration of this bill on the Senate floor with amendments to be offered to make these changes so that we can come forward with a bipartisan bill, a bill that will make America safer but not at the expense of our basic values.

I yield the floor.