Senator John Warner
Chairman, U.S. Senate Committee on Armed Services
225 Russell Office Building
U.S. Senate
Washington, D.C. 20510

Senator Carl Levin
Ranking Member, U.S. Senate Committee on Armed Services
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September 12, 2006

We find it necessary yet again to communicate with you about issues arising out of our policies concerning detainees held at Guantanamo Bay. It would appear that each time the U.S. Supreme Court speaks, efforts are taken to reverse by legislation the decision of the Court. We refer, of course, to the Supreme Court's *Rasul* and *Hamdan* decisions and to the provision in the Administration's proposed Military Commissions Act of 2006 that would strip the federal courts of jurisdiction over even the pending habeas cases that have been brought by the detainees at Guantanamo to challenge the basis for their detention. We urge you to reject any such habeas-stripping provision.

As we have argued and agreed since 9/11, it is necessary for Congress to enact legislation to create military commissions that recognize both the basic notions of due process and the need for specialized rules and procedures to deal with the new paradigm we call the war on terror. This effort must cover those already charged with violating the laws of war and those newly transferred to Guantanamo Bay.

But the military commissions we are now fashioning will have no application to the vast majority of the detainees who have never been charged, and most likely never will be charged. These detainees will not go before any commissions, but will continue to be held as "enemy combatants." It is critical to these detainees, who have not been charged with any crime, that Congress not strip the courts of jurisdiction to hear their pending habeas cases. The habeas cases are the only avenue open for them to challenge the bases for their detention -- potentially life imprisonment -- as "enemy combatants."

We strongly agree with those who have argued that we must arrive at a position worthy of American values, i.e., that we will not allow military commissions to rely on secret evidence, hearsay, and evidence obtained by torture. But it would be utterly inconsistent, and unworthy of American values, to include language in the draft bill that would, at the same time, strip the courts of habeas jurisdiction and allow detainees to be held, potentially for life, based on CSRT determinations that relied on just such evidence. The effect would be to give greater protections to the likes of Khalid Sheikh Mohammed than to the vast majority of the Guantanamo detainees, who claim that they had nothing to do with al Qaeda or the Taliban.

We are on a course that should have been plotted and navigated years ago, and we might be close to consensus. We ask that, in the closing moments of your consideration of this vital bill, you restore the faith of those who long have been a voice for simple commitment to our longstanding basic principles, to our integrity as a nation, and to the rule of law. We urge you to oppose any further erosion of the proper authority of our courts and to reject any provision that would strip the courts of habeas jurisdiction.

As Alexander Hamilton and James Madison emphasized in the Federalist Papers, the writ of habeas corpus embodies principles fundamental to our nation. It is the essence of the rule of law, ensuring that neither king nor executive may deprive a person of liberty without some independent review to ensure that the detention has a reasonable basis in law and fact. That right must be preserved. Fair hearings do not jeopardize our security. *They are what our country stands for.*

Sincerely,

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Donald J. Guter, Rear Admiral, JAGC, USN (Ret.)

David M. Brahms, Brigadier General, USMC (Ret.)