

Mr. LEVIN. Mr. President, I yield myself 15 minutes off the bill itself.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, first let me begin by commending our colleagues on the Armed Services Committee, Senator *Warner*, Senator *McCain*, and Senator *Graham*, for their effort earlier this month to produce a military commissions bill that will protect our troops, withstand judicial review, and be consistent with American values. The administration of their own party had prepared a bill that would authorize violations of our obligations under international law, permit the abusive treatment of prisoners, and allow criminal convictions based on secret evidence. The three Senators drafted a different bill, in consultation with our senior military lawyers. When the administration objected to this bill, Senator *Warner* scheduled a markup in the Senate Armed Services Committee anyway, and we reported that bill out with a bipartisan vote of 15 to 9.

Unlike the administration bill, the committee bill would not have allowed convictions based on secret testimony that is never revealed to the accused. The committee bill would not have allowed testimony obtained through cruel or inhuman treatment. The committee bill would not have allowed the use of hearsay where a better source of evidence is readily available. The committee bill would not have attempted to reinterpret our obligations under international law to permit the abuse of detainees in U.S. custody.

While the committee bill was not perfect--in particular, it included a very problematic provision on the writ of habeas corpus--the military commissions it established would have met the test of the Supreme Court's decision in the Hamdan case and provided for the trial of detainees for war crimes in a manner that is consistent with American values and the American system of justice. It provided standards we would be able to live with if other countries were to apply similar standards to our troops if our troops were captured. And, of course, the committee bill provided for the interrogation, for the detention, and for criminal trials of detainees.

Unfortunately, the committee bill was not brought to the Senate. Instead, the three Republican Senators entered into negotiations with an administration that has been relentless in its determination to legitimize the abuse of detainees and to distort military commission procedures to ensure criminal convictions. The bill before us now is the product of these negotiations. I will be offering the committee-approved bill as a substitute a little later today. The bipartisan committee bill, which came from our committee just about a week ago on a vote of 15 to 9, will be offered by me as a substitute to the bill which is now before us.

The bill before us does make a few significant improvements over the administration bill. I want to begin by outlining what those improvements are.

First, while the bill before us is not as clear as the committee bill in committing us to a standard that will protect our troops by conforming to our obligations under the Geneva Conventions, it is far preferable to the administration bill in this regard. In particular, the

bill before us does not reinterpret U.S. obligations for the treatment of detainees under Common Article 3 of the Geneva Conventions. It does not place a congressional stamp of approval on an executive branch reinterpretation of those obligations. All it does in this regard is to state the obvious: that the President is responsible for administering the laws and that this gives him the authority to adopt regulations interpreting the meaning and application of the Geneva Conventions in the same manner and to the same extent as he can issue such regulations interpreting other laws.

Common Article 3 of the Geneva Conventions, the Detainee Treatment Act, and the new Army Field Manual all prohibit such interrogation abuses as forcing a detainee to be naked, to perform sexual acts or pose in a sexual manner; prevent such abuses as sensory deprivation, placing hoods or sacks over the head of a detainee, applying beatings, electric shock, burns, or other forms of physical pain; waterboarding, using military working dogs, inducing hypothermia or heat injury, conducting mock executions, or depriving the detainee of necessary food, water, or medical care. Nothing in this bill would change any of the standards of the Geneva Conventions, the Detainee Treatment Act, or the Army Field Manual. Nothing in this bill would authorize the President to do so.

Second, the bill does not permit the use of secret evidence that is not revealed to the defendant. Instead, the bill clarifies that information about sources, methods, or activities by which the United States obtained evidence may be redacted before the evidence is provided to the defendant and introduced at trial. Any material redacted from the evidence provided to the defendant cannot be introduced at trial. The defendant would have the right to be present for all proceedings and to examine and respond to all evidence considered by the military commission.

This approach is consistent with the approach taken to classified information in the Manual for Courts Martial, and it ensures that a defendant could not be convicted on the basis of secret evidence, evidence that is not known to him.

Those are two positive changes from the approach which the administration has argued for and demanded, in these two cases without success.

Unfortunately, at the insistence of the administration, the bill before us contains a great many ill-advised changes from the approved bill of the Armed Services Committee. For example, on coerced testimony, the committee-approved bill prohibited the admission of statements obtained through cruel, inhuman, or degrading treatment. The bill before us prohibits the admission of statements obtained after December 30, 2005, through "cruel, inhuman or degrading treatment," but, inexplicably, contains no such prohibition for statements that were obtained before September 30, 2005. As a result, military tribunals would be free to admit, for the first time in U.S. legal history, statements that were extracted through abusive practices.

On the question of hearsay, the committee bill permitted the admission of hearsay evidence not admissible at trials by court-martial, if direct evidence, which is inherently

more probative, could be procured ``through reasonable efforts, taking into consideration the unique circumstances of the conduct of military and intelligence operations during hostilities."

The bill before us makes hearsay evidence admissible unless the defendant can demonstrate that it is unreliable or lacking in probative value. Hearsay evidence is not only inherently less reliable, its use also deprives the accused of the ability to confront witnesses against him. The approach taken by this bill not only relieves the Government of any obligation to seek direct testimony from its witnesses, it also appears to shift the burden to the accused by presuming that hearsay evidence is reliable unless the accused can demonstrate otherwise.

On the question of search warrants, the committee bill, the bill which I will be offering as a substitute later on today--the committee bill provided that evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant. The bill before us deletes the limitation so that it no longer applies to evidence seized outside the United States. As a result, the bill authorizes the use of evidence that is seized inside the United States without a search warrant. This provision is not limited to evidence seized from enemy combatants; it does not even preclude the seizure of evidence without a warrant from U.S. citizens. As a result, this provision appears to authorize the use of evidence that is obtained without a warrant, in violation of the U.S. Constitution.

On the definition of unlawful combatant, the committee bill defined the term ``unlawful combatant" in accordance with the traditional law of war. The bill before us, however, changes the definition to add a presumption that any person who is ``part of" the ``associated forces" of a terrorist organization is an unlawful combatant, regardless of whether that person actually meets the test of engaging in hostilities against the United States or purposefully and materially is supporting such hostilities.

The bill also adds a new provision which makes the determination of a Combatant Status Review Tribunal, or CSRT, that a person is an unlawful enemy combatant--it makes that determination dispositive for the purpose of the jurisdiction of a military commission, even though the CSRT determinations may be based on evidence that would be excluded as unreliable by a military commission.

On the issue of procedures and rules of evidence, the committee bill provided that the procedures and rules of evidence applicable in trials by general courts martial would apply in trials by military commission, subject to such exceptions as the Secretary of Defense determines to be ``required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need." That approach, in our committee bill, was consistent with the ruling of the Supreme Court in the Hamdan case, but built in flexibility to address unique circumstances arising out of military and intelligence operations. The bill before us reverses the presumption. Instead of starting with the rules applicable in trials by courts martial and establishing exceptions, the Secretary of Defense is required to make trials by commission consistent with those

rules only when he considers it practicable to do so. As one observer has pointed out, this provision is now so vaguely worded that it could even be read to authorize the administration to abandon the presumption of innocence in trials by military commission.

On the issue of habeas corpus, the habeas corpus provision in the committee bill stripped alien detainees of habeas corpus rights, even if they had no other legal recourse to demonstrate that they were improperly detained. It also stripped those detainees of any other recourse to

the U.S. courts for legal actions regarding their detention or treatment in U.S. custody. If the committee bill had been brought to the floor, I would have joined in offering an amendment to address the obvious problems with this provision. But at least the court-stripping provision in the committee bill was limited to aliens who were detained outside of the United States. The bill before us expands that provision to eliminate habeas corpus rights and all other legal rights for aliens, including lawful permanent residents detained inside or outside the United States who have been determined by the United States to be the enemy. The only requirement is that the United States determine that the alien detainee is an enemy combatant--but the bill provides no standard for this determination and offers the detainee no ability to challenge it in those cases which I have identified.

Consequently, even aliens who have been released from U.S. custody, such as the detainee that the Canadian Government recently found was detained without any basis and was subjected to torture, would be denied any legal recourse as long as the United States continues to claim that they were properly held.

I yield myself an additional 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. In other words, a determination by the United States could not be contested, even if there is overwhelming evidence that the claim was incorrect.

These changes in the committee bill, a bill which was approved on a bipartisan basis in our committee, the changes that appear in the bill which is now before us, taken together, will put our own troops at risk if other countries decide to apply similar standards to our troops if they are captured and detained. These changes in the bill before us from the committee bill are likely to result in the reversal of convictions on appeal, and that means that efforts to convict these people of crimes can be readily reversed on appeal because of the changes that were made in the committee bill and the fact, which seems to me to be quite clear, that they do not comply in many instances with the requirements set forth in Hamdan, and the changes in the bill before us from the committee bill are inconsistent with American values.

I particularly again highlight the search and seizure requirements of our fourth amendment and the way that seems to be abandoned in the bill before us.

I close by applauding, again, Senators *Warner*, *McCain*, and **GRAHAM** for their willingness to stand up to the administration and at least at the Armed Services Committee produce a bill that we were able to approve in the Armed Services Committee on a strong bipartisan vote.

However, the administration has been even more relentless in their effort to legitimize the mistreatment of detainees and to undermine some of the cornerstone principles of our legal system. While the bill before us is a modest improvement over the language originally proposed by the administration, it has adopted far too many provisions from the administration's bill. The substitute which we will be offering later on today is the committee-approved bill. That will do a much better job, if we adopt it, of protecting our troops who might become detainees in the future and does a much better job of upholding our values as a nation.

I yield the floor.