growth of incivility that confirms the broken-windows theory. This breakdown of civil norms is not the exclusive failing of either the political left or the right. It spreads across the political spectrum. It is typically carried out, not by the candidates, but by auxiliary groups and other campaigners, who attempt to help their cause by demonizing their opponents.

For example, New Jersey's just-completed race for governor was marred by cross allegations of marital infidelity.

Such examples—unfortunately, there are many more—come from so-called leaders in the marketplace of ideas, all of whom are highly educated and must stand behind their public statements. The Internet, with its easy access and worldwide reach, is a breeding ground for even more degrading incivilities.

This illustrates the first aspect of the broken-windows theory: Once the incivility starts, people will take it as an invitation to join in, and pretty soon there's little limit to the incivility.

A second aspect of the broken-windows theory, however, is also happening.

Wilson and Kelling describe this response when the visible signs of order deteriorate in a neighborhood: ''Many residents will think that crime, especially violent crime, is on the rise, and they will modify their behavior accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows, moving with averted eyes, silent lips, and hurried steps. Don't get involved.''

We see this in the political arena. Many are opting out as civility breaks down in the marketplace of ideas. In the last two presidential elections, fewer than half of eligible voters even bothered to vote; voter participation in national elections is on a 40–year decline. As the atmosphere turns hostile to anything approaching a civil exchange or a real dialogue, citizens depart from the political process and shun their civic responsibility.

This is the real danger of incivility. Our free-breathing, self-governing society requires the oxygen of an open exchange of ideas. It requires a certain level of civility rooted in mutual respect for each other's opinions. However, what we see today is an accelerating competition between the left and the right to see which side can inflict more damage to the other. Increasingly, participants in public debates appear to be exchanging ideas when in fact they are spewing invective.

When behavioral norms break down in a community, the police can restore order.

But when civility breaks down in the marketplace of ideas, the law is generally powerless. Our right to speak freely—indeed, to speak with incivility—is guaranteed by the First Amendment.

If we are to prevail as a free, self-governing people, we must restore civility to public discourse. We have to be responsible. We must govern our tongues and our pens. Whether the incivility occurs on a talk show, in a newspaper column, in political campaign ads, at the office water cooler, or in an Internet chat room, it must be met with active disapproval.

This is not to say that democracy requires consensus; it requires debate, which . presupposes that we have disagreements. But civility demands of us that we not let those disagreements—even during these times of great division between the left and the right—push us into words or acts of sharp offense or violence.

By encouraging us to see as equals even those with whom we disagree vehemently, civility lets us hold the respectful dialogues without which democratic decision-making is impossible.

CONFERENCE REPORT ON H.R. 1815, THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006

SPEECH OF

HON. JOHN CONYERS, JR.

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Sunday, December 18, 2005

Mr. CONYERS. Mr. Speaker, while I am a strong supporter of the brave men and women who serve in our armed forces, I am deeply opposed to the unnecessary and pernicious last-minute amendment added to this bill by Senators GRAHAM, LEVIN, and KYL. I am also disappointed that the conferees have made further changes to the provision that will only further damage our rule of law and compromise the efforts of our soldiers around the world.

Their amendment, which is now Section 1405 of this bill, may severely curtail the federal court's review of detainees operations in ways that do irreparable damage to our rule of law. The provision also fails unequivocally to condemn torture and abuse, or the erratic and unreliable information that practice yields. These flaws are contrary to the fundamental principles of our legal traditions.

Let me first focus on the torture issue. Never before in America's proud history have we countenanced a system in which there is even a possibility that human liberty might be taken away based on evidence extracted by torture. And it is this refusal to debase ourselves, by resorting to immoral and illegal techniques, that lies at the core of our best and most noble traditions.

We should have made clear beyond doubt in this provision that we do not approve of and we are not willing to tolerate a system that rests on torture today. Even if it were true that there may be some extreme case—say, the infamous ''ticking time-bomb'' scenario—that could vindicate the use of abhorrent physical coercion, that exceptional case would not warrant the use of that evidence—evidence that our intelligence services have told us is very often unreliable—in subsequent judicial proceedings. There is simply no excuse or justification for this omission.

As we try to establish new democracies and the rule of law for Iraq and Afghanistan in place of sanctuaries for terrorists, Congress's failure to condemn and bar abuse is shameful, intolerable, and deeply hypocritical: How can we refuse to practice what we preach to other countries?

Congress must return to this issue as soon as possible and make good the promise of Senator MCCAIN's wise anti-abuse provision; after all standards are important but, as we have learned time and time again, we also need accountability and enforcement.

Time is of the essence because continued torture and abuse hurts our efforts in Iraq and beyond against al Qaeda. The persistent wave of stories about prisoners detained for the wrong reasons, or subjected to inappropriate treatment or abuse while in U.S. custody has inflicted terrible harm on our reputation, and on the efforts by our brave men and women in Iraq to win the hearts and minds campaign. Establishing a meaningful system of accountability for detainee operations is not only a matter of restoring America's honor in the eyes in the world, it is a vital part of our counterterrorism strategy.

Accountability, moreover, cannot be achieved without independent monitoring mechanisms. The rule of law, as events of the past four years have made clear, dies behind closed doors and barbed-wire. Cutting off meaningful judicial supervision of the Guantánamo Naval Base will not restore the military's honor. And turning the federal courts into rubber stamps for decisions generated through the rack and the screw would stain our legal traditions.

As Senator SPECTER powerfully urged, these difficult issues must be assigned to the House and Senate Judiciary Committees for their careful and expert consideration. Senator SPECTER's wise counsel has been repeated in letters from senior members of our armed forces, who have already retired; a bipartisan group of respected former federal judges; the American Bar Association; and a broad cross-section of professors from the legal academy. This wide-ranging opposition indicates how thorny these issues are, and how unwise it is to move so quickly on them.

I am heartened, however, that we have been able to preserve much that is not harmful in this provision. There are some sound ideas embedded in these provisions that we should use when we reconsider these issues.

Central to Congress's aim in this provision is a distinction between those detainees who have already been subject to a Combatant Status Review Tribunal (CSRT) and new detainees who will be subject to a future CSRT procedure that Congress will certify more than six months from now. For those who have already been subject to a CSRT and now challenge either that procedure or the lawfulness of the military commission system, the provision does not affect access to the federal courts.

Through section(h)(2), Congress has crafted a new system of judicial review for cases that will be brought under a new system of CSRTs, to be designed by the Secretary of Defense and reviewed with care by Congress. These appeals from new CSRTs will be heard in the United States Court of Appeals for the District of Columbia Circuit. And even in these new cases, the provision does not alter the now-established ability of attorneys to visit clients at Guantánamo. Attorneys litigating their cases in a circuit court need access to and communication with their client, as recent filings in the Hamdan v. Rumsfeld case show.

But section (h)(2) also circumscribes the new system of review to new cases, which will of necessity arise more than six months from now, when the new CSRT procedures have been promulgated. We have preserved the existing, expansive review role of the federal courts for the habeas petitions filed by those who have already been through a CSRT. So detainees who have already had a CSRT hearing, including those who have pending habeas petitions, will continue to have traditional habeas review.

We also chose in paragraph 3 of subsection (e) not to legislate an abstention rule. For those who have filed challenges to their military commissions, we did not take the extraordinary step of requiring convictions or other exhaustion before they come into federal court. As in Ex Parte Quirin, we have permitted pre-conviction challenge to be brought up to the U.S. Supreme Court. Paragraph 3

simply governs challenges to ''final decisions'' of commissions, and does not impact challenges when they are not brought ''under [that] paragraph.'' See Section 1405 (e)(3)(c),(d).

To be sure, a few provisions are singled out to apply to pending cases, but these are provisions that give those who have filed cases additional rights, instead of taking any rights away. One such provision was added in conference with respect to coerced testimony, Section 1405(b)(2). But that provision does not in any way alter the clear intent of the Congress, which was to grandfather the jurisdiction of existing Guantánamo habeas and mandamus lawsuits under Lindh v. Murphy.

As such, nothing in the legislation alters or impacts the jurisdiction or merits of Hamdan. And, quite obviously, nothing in the legislation constitutes affirmative authorization, or even toleration, for the military commissions at issue in that case. That is the question that the Supreme Court will decide in the coming months. Our mention of commissions simply reflects, but does not endorse, the fact that the lower court in Hamdan held them legal.

This provision attempts to address problems that have occurred in the determinations of the status of people detained by the military at Guantánamo Bay and elsewhere. It recognizes that the CSRT procedures applied in the past were inadequate and must be changed going forward. As the former Chief Judge of the U.S. Foreign Intelligence Surveillance Court found, in In Re Guantánamo Detainee Cases, the past CSRT procedures ''deprive[d] the detainees of sufficient notice of the factual bases for their detention and den[ied] them a fair opportunity to challenge their incarceration,'' and allowed ''reliance on statements possibly obtained through torture or other coercion.'' Her review ''call[ed] into serious question the nature and thoroughness'' of the past CSRT process. The former CSRT procedures were not issued by the Secretary of Defense, were not reported to or approved by Congress, did not provide for final determinations by a civilian official answerable to Congress, did not provide for the consideration of new evidence, and did not address the use of statements possibly obtained through coercion.

To address these problems, this provision requires the Secretary of Defense to issue new CSRT procedures and report those procedures to the appropriate committees of Congress; it requires that going forward the determinations be made by a Designated Civilian Official who is answerable to Congress; it provides for the periodic review of new evidence; it provides for future CSRTs to assess whether statements were derived from coercion and their probative value; and it provides for review in the D.C. Circuit Court of Appeals for these future CSRT determinations.

At the same time, in accordance with our traditions, this amendment does not apply retroactively to revoke the jurisdiction of the courts to consider pending claims invoking the Great Writ of Habeas Corpus challenging past enemy combatant determinations reached without the safeguards this amendment requires for future determinations. The amendment alters the original language introduced by Senator GRAHAM so that those pending cases are not affected by this provision. Accordingly, subsection (h)(1) establishes that generally the provisions of this section, including subsection (e)(1), which affects the substantive rights of parties, apply only as of the date of enactment of this provision in accordance with the Supreme Court's decision in Lindh v. Murphy.

Recognizing the Supreme Court's concerns about judicial independence in cases such as City of Boerne v. Flores and United States v. Morrison, we have underscored that Congress is not attempting to settle any constitutional question that is the proper province of the federal courts. Thus in sections (e)(2)(C)(ii), (e)(3)(D)(ii), and (f), we have made clear, out of an abundance of caution, that we not purport to decide any constitutional question that remains within the proper bailiwick of the federal courts pursuant to Article III of the Constitution. Thus, this provision does not speak to the constitutionality of the military commissions or the old CSRTs. We leave it to the courts to decide these questions.