The New Yorker noted, "under the Bush administration's secret interrogation guidelines, the killing of Jamadi might not have broken any laws." Unfortunately, there is no reason to assume that Bush has not given interrogators a license to kill. Steven Bradbury, head of the Justice Department's Office of Legal Counsel, told a closed session of the Senate Intelligence Committee early this year that Bush could order killings of suspected terrorists within the United States. When *Newsweek* contacted the Justice Department to verify this novel legal doctrine, spokeswoman Tasia Scolinos stressed that Bradbury's comments occurred during an "off-the-record briefing." Any Bush-ordered killings within the United States would also presumably be off the record.

President Bush has been able to seize nearly boundless power because his administration has been able to control what Americans know. But this control is crumbling. Democratic congressional investigations, court cases, and the military tribunals themselves could unearth far more damaging documents and photographs than anything seen thus far.

The MCA is "enabling act" legislation that preserves the appearance of law while empowering the commander in chief to do as he pleases. Bush's torture policies may signal that he accepts the dicta of Richard Nixon: "When the president does it, that means that it is not illegal." But the firewall of high approval ratings that buttressed Bush when the first Abu Ghraib photos leaked is gone. The media is exasperated with the administration's penchant for secrecy. Much of Bush's conservative intellectual bodyguard has given up the fight. It remains to be seen how much dunking, thumping, and cold water the Bush team can survive. ■

James Bovard is the author of Attention Deficit Democracy *and eight other books.*

Prisoners' Dilemma

Indefinite detention of terrorist suspects poses a challenge to America's most valuable legal traditions.

By Gerald J. Russello

THE RECENTLY ENACTED Military Commissions Act and the Supreme Court *Hamdi* and *Hamdan* decisions, which tried to limit the suspension of the protections of habeas corpus, have spurred a new series of debates on the somewhat technical legal area of habeas corpus. The Great Writ, as it was known, stands for a very simple principle: power does not trump. A government may wish to detain someone secretly, perhaps indefinitely, and may believe it has good reasons to do so, but in the Anglo-American legal tradition, that is not good enough. As the Supreme Court stated in 1969, the writ is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." The government therefore has to "produce the body for examination," as the translation of the full Latin tag put it, before a magistrate and justify the reasons for the person's detention.

The position announced in the MCA and its related statutes may or may not be bad policy for defeating terrorism, but it certainly undermines a key component of free government. Government must in the normal course act in the open and must be held to a standard of reasonableness as to its actions, including being forced to explain why it has decided to detain someone. In the American legal tradition, and more broadly that of the West in general, providing the protections of habeas corpus has been a mark of civilizational achievement and we rightly consider those countries that do not do this to be less developed.

Americans across the political spectrum support the general principle of habeas corpus, but the war on terror has created opposing views about its application. On the one hand, some, mostly conservatives, have supported the government's authority to hold possible enemy combatants in foreign countries or at home without charge or judicial process. For them, the exigencies of the new threats to our safety justify reconsideration of traditional civil liberties. Others, generally liberals, have sought to extend the Constitution's guarantee of habeas corpus to anyone brought within the power of the American government, even non-citizens captured in military operations abroad. For this side, the war on terror is analogized to the civil-rights movement and seen as another area for expansion of rights beyond their traditional scope.

While both sides are playing to their respective bases, the dispute is real, and each side has legitimate arguments to which it can turn. It is clear, however, that no one had thought out the situation that has led to the MCA beforehand. This is especially the case for those supporting the war, for whom the conquest would be a "cakewalk" and the possibility of holding persons for over three years in military facilities, if ever considered, was never stated publicly. As a result of its invasions of Iraq and Afghanistan, the United States is now

presented with thousands of people of uncertain status who have been transported far from their homes, who have been collected into facilities indefinitely, and who have no real redress in either American courts or through the military justice process. The *Hamdan* decision does not solve this: the case merely holds that for those people determined by a tribunal to be enemy combatants, habeas protections apply to a degree; however, the government has no obligation to ever determine when someone is an enemy combatant, casting these individuals into jurisprudential no-man's land. This situation has no real precedent in American history, and one can feel some sympathy for those trying to wrestle with the legal and political issues the war on terror has caused and the strain it has put on constitutional government.

With its actions in Guantanamo Bay, Abu Ghraib, and elsewhere, the United States has entered unknown territory, and is walking the knife edge between retaining the clear characteristics of a free republic and becoming something else. Some people have taken to calling this new entity an empire, but that is true only in certain respects. Because of its refusal to acknowledge any intent to occupy or govern conquered territories as its own possessions, preferring a policy of democratizing "rogue states," what may be emerging is more of a perpetual war state, preparing for and engaging endless combat against "terror."

Whatever it is called, one of the features of this emerging entity is the stratification within it of individuals based on their status—from full citizens down to those awaiting "enemy combatant" designations who are basically at the whim of the government. That too is an unfortunate side effect of imperial ambition—and one, perhaps not coincidentally, reflected in the maze of classifications and status designations in the immigration law. In one case, there is a class of guest workers abroad, who are not citizens but are useful for domestic policy; the other is a class of guest detainees serving a similar purpose for foreign policy.

But here is the tricky part: a state action can be "lawless," in the language of the Supreme Court, only if it violates some law. In American jurisprudence that means statutory law or the Constitution. So if the law does not apply to foreigners, as respectable conservative argument might propose, what is the big deal? The Constitution provides that the right of habeas corpus may be abrogated only "when in cases of Rebellion or Invasion the Public Safety may require it." This language was clearly intended to cover a limited crisis whose end could be determined with some certainty. Rebellion and invasion have commonsense, widely understood meanings. It is obviously far from clear how this limited exception may interact with an endless war on terror, with no clear guideposts or defined enemies. The Constitution does not directly address the question of what to do with these detainees.

Habeas corpus is not a universal right protecting one from being hauled up and locked away. Nor is it some irrevocable principle like the law of gravity. But that is not the end of the story. As conservatives well know, historical experience and development, even with its recognized flaws, is a surer safeguard of liberty than an appeal to vague or expansive "rights" and must be sustained by the customs, conventions, and beliefs of a people. This is where those advocating universal application of habeas fall short: their "rights talk" ignores the flaws of that theory of rights as it has been applied to areas ranging from criminal procedure to religious freedom: endless assertion of right against right (here, the right of habeas corpus against that of national self-defense) makes political life impossible. And their rush to support the *Hamdan* Court's reliance on the Geneva Conventions or international law is clearly only a fig leaf for their own preferred outcomes. If the Conventions permitted slavery or torture, they would not be considered so persuasive.

But in pushing for limitations on habeas corpus, conservatives are ignoring their own best traditions. Conservatives are rightly suspicious of government, or at least they are with respect to the efficient provision of health care or welfare; it has been less so recently on issue of war. But the *Hamdi* decision perfectly illustrates the reasons for conservative suspicion: there the government wanted to detain a citizen without habeas corpus simply because it determined he was an "enemy combatant." The Supreme Court, in a set of divided opinions, put a stop to that nonsense, but the fact that the case had to come before the Court at all should serve as a reminder to conservatives that the nature of a centralizing power is to strengthen itself.

The debate over extending habeas protections is echoed in the debate over torture. The debate over torture is basically on utilitarian terms: how many

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terrorists are worth torturing, and to what degree, in exchange for saving how many lives? A form of this utilitarian calculus is at play as well in the habeas corpus debate. The thinking seems to be that the greater the number of detainees, the less harm will come to us. But this is the wrong approach. The practice of torture is corrupting to us, as well as damaging to those we torture, because the practice degrades us. Once a society starts arguing about when such coercive methods are "appropriate," it has already begun to condone permitting its own citizens to brutalize and debase themselves as well as harm their victims. Similarly with habeas corpus: while those subject to the MCA are being ill served, getting citizens used to the having large numbers of foreigners held at our mercy is corrosive and corruptive of our liberty. Once a nation grows accustomed to the idea that it may hold some people without trial indefinitely, it is easier to dissolve the characteristic—citizenship—that is marked out as the reason for different treatment.

The habeas corpus debate, much like our debate over the uses of torture, betrays the absolutist mind lurking beneath much of American idealism. According to this mindset, recognized by conservatives such as Robert Nisbet over 40 years ago, the "moral and political aspirations" of foreign policy blind us to realities on the ground. Here a great injustice is being done to many people within the direct power of the United States to help, and all the talk of promoting democracy or defeating the terror masters will not hide that. ■

Gerald J. Russello is editor of The University Bookman. *His book on the thought of Russell Kirk is being published by the University of Missouri Press.*

The Party's Over

The 2006 midterms were more significant than Republican strategists want to admit.

By Martin Sieff

SHRED THE PREDICTABLE SPIN that the midterm elections were of no consequence. What happened on Nov. 7 was seismic: the Fall of the House of Neocon has begun. Bush partisans are calling it Black Tuesday, but it may prove bright for old-fashioned conservative constitutionalists and naïve believers in traditional liberties. All is, as my Irish countryman W.B. Yeats memorably said, "changed, changed utterly."

Many of the Republicans' mightiest pillars are gone from the House of Representatives and the Senate—probably never to return. George Allen, once full of presidential promise, ran arguably the most bungled senatorial campaign in American history. Rick Santorum, distinguished in his waning days by increasingly fierce denunciations of Islamofascism, was toppled in Pennsylvania. Mike DeWine, another ecstatic partisan of eternal war, was politically annihilated in Ohio. Conrad Burns is gone in Montana. Bush's global adventure proved toxic to them all. Add the forced departure of House Majority Leader Tom DeLay, and the K Street Project was in ruins even before Nancy Pelosi played Alaric the Goth to the imperial dreamers and rode triumphant into their capitol.

This was no routine erosion of support for an effective two-term president in his last midterm election as the Prophet Krauthammer opined the morning after. No Republican president has lost a GOP-controlled House and Senate since Dwight D. Eisenhower did in 1954—52 years ago. And in that generation of post-FDR, post-New Deal domination by the Democrats, the "me-too" liberal Republicans felt lucky to have held on that long. But 2006 was not 1954. It was not even 1994, when Bill Clinton was stunned by the loss of both chambers to a resurgent conservative Republican Party. It was not even 1946 when the Democrats lost 55 seats in the House—close to twice the number they gained this year.

Truman, Eisenhower, and Clinton all lost control of this House in their first midterm elections as president. But all three won handsomely two years later, coasting home in times of peace and prosperity. It remains to be seen if the nation will be prosperous two years from now: the record deficits Bush has run up are neither conservative nor reassuring. But thanks to Iraq, America will surely not be at peace if Bush sticks to his determination to "stay the course." Whatever else it is, that is a sure recipe for a Democratic presidential victory in 2008. Adlai Stevenson could not shake the burden of Korea that Truman had bequeathed him in 1952, and Hubert Humphrey suffered the same weight with Vietnam on his back thanks to LBJ in 1968. Whoever the GOP runs in 2008 will face the same problem.

In fact, the recent midterms produced a far more serious result for Bush and the GOP than the elections of 1950 and 1966 did for the incumbent Democrats