issue of foreign detainees is long overdue, we must not act hastily when the "great writ"—something that protects us all—is at stake.

I ask unanimous consent to have printed in the RECORD a letter from the deans of four of our Nation's most prestigious law schools that articulates the dangers of adopting the Graham amendment.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NOVEMBER 14, 2005.

DEAR SENATOR LEAHY: We write to urge that the Senate adopt the amendment of Senator Bingaman removing the court-stripping provisions of the Graham Amendment to the Department of Defense authorization bill. As professors of law who serve as deans of American law schools, we believe that immunizing the executive branch from review of its treatment of persons held at the U.S. Naval Base at Guantánamo strikes at the heart of the idea of the rule of law and establishes a precedent we would not want other nations to emulate.

At the Guantánamo Naval Base, the Government has subjected foreign nationals believed to be linked to Al Qaeda to long-term detention and has established military commissions to try a small number of the detainees for war crimes. It is entirely clear that one of the Executive Branch's motivations for detaining noncitizens at Guantánamo was to put their treatment beyond the examination of American courts.

The Supreme Court rejected the Government's claim in Rasul v. Bush that federal habeas corpus review did not extend to Guantánamo. The extent of the rights protected by federal habeas law is now before the Federal Court of Appeals for the D.C. Circuit. Another challenge has been filed to the authority of the President, acting without congressional authorization, to convene military commissions at Guantánamo. Just last week the Supreme Court announced that it would review the case, Hamdan v. Rumsfeld.

The Graham Amendment would attempt to stop both of these cases from proceeding and would unwisely interrupt judicial processes in midcourse. Respect for the constitutional principle of separation of powers should counsel against such legislative interference in the ongoing work of the Supreme Court and independent judges.

Unfortunately, the Graham Amendment would do much more. With a minor exception, the legislation would prohibit challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment.

To put this most pointedly, were the Graham Amendment to become law, a person suspected of being a member of Al Qaeda could be arrested, transferred to Guantánamo, detained indefinitely (provided that proper procedures had been followed in deciding that the person is an "enemy combatant"), subjected to inhumane treatment, tried before a military commission and sentenced to death without any express authorization from Congress and without review by any independent federal court. The American form of government was established precisely to prevent this kind of unreviewable exercise of power over the lives of individuals.

We do not object to the Graham Amendment's procedural requirements for determining whether or not a detainee is an enemy combatant and providing for limited judicial review of such decisions. This kind of congressional structuring of the detention of military prisoners is long overdue, and it highlights the absence of congressional regulation of standards of detainee treatment and the establishment of military commissions. Curiously, the Graham Amendment recognizes the need for judicial review of the determination of enemy combatant status, but then purports to bar judicial review of far more momentous commission rulings regarding determinations of guilt and imposition of punishment.

We cannot imagine a more inappropriate moment to remove scrutiny of Executive Branch treatment of noncitizen detainees. We are all aware of serious and disturbing reports of secret overseas prisons, extraordinary renditions, and the abuse of prisoners in Guantánamo, Iraq and Afghanistan. The Graham Amendment will simply reinforce the public perception that Congress approves Executive Branch decisions to act beyond the reach of law. As such, it undermines two core elements of the rule of law: congressionally sanctioned rules that limit and guide the exercise of Executive power and judicial review to ensure that those rules have in fact been honored.

When dictatorships have passed laws stripping their courts of power to review executive detention or punishment of prisoners, our government has rightly challenged such acts as fundamentally lawless. The same standard should apply to our own government. We urge you to vote to remove the court-stripping provisions of the Graham Amendment from the pending legislation.

T. ALEXANDER ALEINIKOFF,
Dean, Georgetown University Law Center.
ELENA KAGAN,
Dean and Charles Hamilton Houston Professor of Law, Harvard Law School.
HAROLD HONGJU KOH,
Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School.
LARRY KRAMER,
Dean and Richard E. Lang Professor of Law, Stanford Law School.

Mr. LEVIN. Mr. President, the Graham amendment, which the Senate approved last Thursday, includes a prohibition on Federal courts having jurisdiction to hear habeas petitions brought by aliens outside the United States who are detained by the Defense Department at Guantanamo Bay, Cuba.

The Graham-Levin-Kyl amendment would make three significant improvements to the underlying Graham amendment.

The habeas prohibition in the Graham amendment applied retroactively to all pending cases—this would have the effect of stripping the Federal courts, including the Supreme Court, of jurisdiction over all pending case, including the Hamdan case.

The Graham-Levin-Kyl amendment would not apply the habeas prohibition in paragraph (1) to pending cases. So, although the amendment would change the substantive law applicable to pending cases, it would not strip the courts of jurisdiction to hear them.

Under the Graham-Levin-Kyl amendment, the habeas prohibition would take effect on the date of enactment of the legislation. Thus, this prohibition would apply only to new habeas cases filed after the date of enactment.

The approach in this amendment preserves comity between the judiciary and legislative branches. It avoids repeating the unfortunate precedent in Ex parte McCardle, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court.

The Graham amendment would provide for direct judicial review only of status determinations by combat status review tribunals, not to convictions by military commissions.

The Graham-Levin-Kyl amendment would provide for direct judicial review of both status determinations by CSRTs and convictions by military commissions. The amendment does not affirmatively authorize either CSRTs or military commissions; instead, it establishes a judicial procedure for determining the constitutionality of such processes.

The Graham amendment would provide only for review of whether a tribunal complied with its own standards and procedures.

The Graham-Levin-Kyl amendment would authorize courts to determine whether tribunals and commissions applied the correct standards, and whether the application of those standards and procedures is consistent with the Constitution and laws of the United States.

This amendment is not an authorization of the particular procedures for the military commissions; rather it is intended to set a standard—consistent with our Constitution and laws—with which any procedures for the military commissions must conform.

Mr. REID. Mr. President, in a series of votes last Thursday and today, the Senate has voted to deny the availability of habeas corpus to individuals held by the United States at Guantanamo Bay, Cuba. I rise to explain my vote against the Graham amendment last week, and my votes in favor of the Bingaman amendment and the Graham-Levin amendment earlier today.

First, let's put the whole issue of the rights of suspected terrorists in context. As Senator MCCAIN said over the weekend, terrorists are "the quintessence of evil. But it's not about them; it's about us." This debate is about respect for human rights and adherence to the rule of law. It is about the continued moral authority of this Nation.

For the past four years, the Bush administration has advocated a policy of detaining suspects indefinitely and largely in secret, without access to meaningful judicial oversight. This policy is inconsistent with our core