

A LETTER TO THE NEXT PRESIDENT OF THE UNITED STATES

Senator Obama:

In his recent opinion on the Boumediene case, conservative Justice Anthony Kennedy reminded the Executive and Legislative branches that we cannot suspend the Constitution in times of crisis.

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

He went on to remind "the political branches" that the Article III Courts must not be turned into a mere rubber stamp for the Executive Branch—particularly when, as with habeas corpus, those Courts review laws designed to serve as a check on the Executive Branch.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.

Ultimately, the Supreme Court found aspects of the Military Commissions Act unconstitutional because it tried to limit the review of Article III Courts to mere review of whether the Administration had complied with its own procedures, and not a real review of the legality of the detention of men at Gitmo.

The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense" and whether those standards and procedures are lawful.

Yet this is precisely the kind of procedural review that the current FISA bill envisions. The "political branches" are attempting to limit court review of wiretaps on Americans to a procedural review in three ways:

- The Court can only certify that the current Attorney General has claimed the warrantless wiretap program was legal; it cannot assess the representations to the telecoms, nor review the legality of the underlying program.
- The Court can only approve the procedures planned in a given wiretap program, it cannot review whether the actual program is legal.
- The Court can only review proposed minimization procedures intended to protect US persons' data; it cannot review whether the

Administration is actually following its own minimization procedures.

The Courts' role in protecting Americans' Fourth Amendment rights is just as important a check on unrestrained executive power as its review of habeas corpus. After all, the Fourth Amendment, just like habeas corpus, is a foundational principle of this country designed to guard against the abuse of power familiar before our Forefathers revolted against the rule of Kings. As Justice Kennedy said, we cannot suspend these principles simply because the country faces a crisis.

Senator Obama, you are asking voters to choose you to become the President of the United States. You had to as Senator—and will as President—swear an oath to protect and defend the Constitution.

You cannot remain silent on this issue and at the same time fulfill your promise, the one you have made, and the one you will make, to defend the Constitution. Remaining silent rejects the separation of powers. Remaining silent presumes that the "political branches" can simply legislate the Courts into submission. And remaining silent communicates that you—the next President of the United States—believes checks on executive power like habeas corpus and the Fourth Amendment are mere niceties and not foundational principles of this great nation.

As the presumptive leader of the Democratic Party, you can lead your fellow Senators in rejecting this unconstitutional law. But without your leadership, the Constitution will suffer a dangerous blow.