THE POLITICAL SCENE

KILLING HABEAS CORPUS

Arlen Specter's about-face.

BY JEFFREY TOOBIN

President Abraham Lincoln suspended habeas corpus in Maryland on April 27, 1861, two weeks after the Confederate attack on the Union garrison at Fort Sumter. "Lincoln could look out his window at the White House and see Robert E. Lee's plantation in Virginia," Akhil Reed Amar, a professor at Yale Law School and the author of "America's Constitution," said. "He was also facing a rebellion of so-called Peace Democrats in Maryland, meaning there was a real chance that Washington would be surrounded and a real threat that the White House would be captured." On Lincoln's order, federal troops arrested Baltimore's mayor and chief of police, as well as several members of the Maryland legislature, who were jailed so that they couldn't vote to secede from the Union.

Since the Middle Ages, habeas corpus—"You should have the body"—has been the principal means in Anglo-American jurisprudence by which prisoners can challenge their incarceration. In habeas-corpus proceedings, the government is required to bring a prisoner—the body—before a judge and provide a legal rationale for his continued imprisonment. The concept was so well established at the time of the founding of the American Republic that the framers of the Constitution allowed suspensions of the right only under narrow circumstances. Article I, Section 9, states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Such suspensions have been rare in American history. The most recent occasion was in 1871, when President Ulysses S. Grant sent federal troops to South Carolina to stop attacks by the Ku Klux Klan against newly emancipated black citizens. This fall, however, Congress passed, and President Bush signed, a new law banning the four hundred and thirty detainees held at the American naval base at Guantánamo Bay, and other enemy combatants, from filing writs of habeas corpus.

Specter has had to work in an era of ever-tighter Republican Party discipline.

STEVE BRODNER

The law, known as the Military Commissions Act of 2006, was a logical culmination of an era of one-party rule in Washington. During the Presidency of George W. Bush, the executive branch, with the eager acquiescence of its Republican allies in Congress, has essentially dared the courts to defend the rights of the suspected Al Qaeda terrorists, who have been held at Guantánamo, some for as long as four years. The Supreme Court has twice taken up that challenge and forced the Administration to change tactics; the new law represented a final attempt to remove the detainees from the purview of the Court. Now, of course, Republicans no longer control Congress, but the change in the law of habeas corpus may be permanent.

Arlen Specter was an unlikely steward of the demise of habeas corpus. The Pennsylvania Republican, a senator since 1980, has long been known as a moderate in his caucus, one of the few remaining in a party that has shifted sharply to the right during his career. (The Wednesday Lunch Club, a group of liberal and moderate Republican senators, once had a dozen members. Now, after the defeat in this month's election of Senator Lincoln Chafee, of Rhode Island, it will have three: Specter and the two senators from Maine, Olympia Snowe and Susan Collins.) Moreover, for all his years as a legislator, Specter remains by temperament a litigator and an iconoclast. In his autobiography, "Passion for Truth" (2000), he writes with pride about his work as a young investigator for the Warren Commission; as a crusading Philadelphia district attorney; and as an aggressive cross-examiner of Anita Hill in Clarence Thomas's Supreme Court confirmation hearings. He has, he wrote, a "fetish for facts," and

faith in proceedings like habeas corpus to protect individual rights.

Yet it was Specter who, as chairman of the Judiciary Committee, after leading the fight to preserve habeas corpus, at the last moment voted for the Administration's plan restricting it. At seventy-six, Specter, having survived several bouts of life-threatening illness, has lost some of the abrasiveness that earned him the nickname Snarlin' Arlen, but he generally says what he means, even when it might give offense. His self-confidence sometimes verges on arrogance; his most common expression is a knowing smirk. (It is evident in the cover photograph of his autobiography.) With some justification, and with typical bravado, Specter asserts that the debate over habeas corpus could have been avoided, if only his Republican colleagues had listened to him.

Shortly after September 11, 2001, and the American invasion of Afghanistan, Specter proposed that Congress develop a set of rules for handling the prisoners—the so-called "enemy combatants"—who were captured there. Along with Richard J. Durbin, the Illinois Democrat, Specter introduced the Military Commission Procedures Act of 2002, which would have established a system of trials for the alleged Al Qaeda detainees, with defendants guaranteed, among other things, the presumption of innocence and the right to counsel. "The whole idea never really went anywhere," Specter told me. "Nobody was much interested in it."

The Bush Administration, believing that the treatment of the detainees was a matter that belonged under the exclusive control of the executive branch, was disdainful of attempts by Congress to address the issue. "I went down to Guantánamo with a group of senators shortly after it opened, and Dave Addington was also on the trip," Lindsey Graham, the Republican senator from South Carolina, recalled, referring to Vice-President Dick Cheney's counsel, who has been a leading advocate in the Administration for a broad view of Presidential power. "As we were flying back to the States, I pulled Dave aside on the plane and said, 'You really need to come over and draft some legislation with us, and, if you do that, the Supreme Court will be much more likely to uphold what we do. It would be better to work in concert with each other when it comes to wartime decision-making about how you try and interrogate a prisoner.'

"I remember Dave had a copy of the Constitution he carried around with him," Graham went on. "He took it out, and he said the Administration didn't need congressional authorization for what it was doing. The President had the inherent authority to handle the prisoners any way he wanted. And I said, 'That may be a good legal argument, but it's not a good political argument. The more united the nation, the better it is for everyone.' But Dave said, 'Thanks but no thanks.' And after that we never had much dialogue." Or, as Specter put it, "We still had discussions with the Department of Defense—perhaps in part because the general counsel was interested in a judgeship—but they didn't go anywhere."

In the meantime, though, some of the detainees at Guantánamo, in an effort to force the government to provide legal justification for the incarcerations, began filing petitions for habeas corpus in federal courts. The first group of cases reached the Supreme Court in the spring of 2004, and the government's position was clear: the detainees had no right even to bring such cases in federal court. As Theodore B. Olson, the Solicitor General at the time, put it in the oral argument, for "an alien who had never had any relationship to the United States and who was being held as a result of a combat situation or a war situation in a foreign jurisdiction, there was no jurisdiction under the habeas statute."

But the Supreme Court soundly rejected the Administration's argument, ruling in June, 2004, that the detainees had the right to sue for their freedom. Justice John Paul Stevens, in his opinion in Rasul v. Bush, observed pointedly, "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." Or, as Justice Sandra Day O'Connor wrote in Hamdi v. Rumsfeld, a related case that was also decided in 2004, "We have long since made clear

that a state of war is not a blank check for the President."

In her opinion, O'Connor all but invited the Bush Administration to collaborate with Congress on a plan for the detainees. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake," she wrote. But, in the months that followed, the Bush Administration continued to ignore proposals for legislation on Guantánamo by Specter and others in Congress. Addington's view—that the executive branch alone could dictate the detainees' treatment and define the rules of their trials—remained the government's position. (Addington declined to comment for this article.)

The Administration, meanwhile, drafted a plan for military commissions or tribunals for the prisoners, which could, of course, result in the imposition of the death penalty. The detainees challenged this plan, too, and another group of habeas-corpus petitions arrived at the Court last spring. The Administration's views had hardly changed since Rasul and Hamdi. As the government argued in its brief, "one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the law of war."

But the Court again rejected the White House's position, ruling, in Hamdan v. Rumsfeld, that Congress, and not just the President, must establish the rules for trying the prisoners. The decision in Hamdan was announced on June 29, 2006, and Specter had been waiting for it. "I pretty much knew what it was going to say, or thought I did. And we had legislation all ready to go," Specter told me. "It came down in the morning, and I introduced the legislation in the afternoon."

In crafting legislation, especially legislation related to the war on terror, Specter had less room to maneuver than most Republican committee chairmen. His record as a moderate nearly cost him the leadership of the Judiciary Committee before he had a chance to assume it. At a press conference on the day after he was reëlected in 2004, Specter repeated a view he had expressed many times, saying that he regarded the protection of abortion rights established by Roe v. Wade as "inviolate," and suggesting that "nobody can be confirmed today" who didn't share that opinion. Almost immediately, conservative groups in the Republican Party demanded that Specter be denied the chairmanship. Protesters chanted outside his office and inundated the Senate switchboard with telephone calls.

After a series of tense meetings with his Republican colleagues, Specter was allowed to take over as chairman of the committee, but he had to make certain promises, especially about Bush's nominations to the Supreme Court. "I have voted for all of President Bush's judicial nominees in committee and on the floor," Specter said in a carefully worded statement at the time. "And I have no reason to believe that I'll be unable to support any individual President Bush finds worthy of nomination." In the subsequent two years, Specter was as good as his word, shepherding the nominations of John G. Roberts, Jr., and Samuel A. Alito, Jr., to confirmation to the Supreme Court. Nearly two decades earlier, Specter had provided a key vote against Ronald Reagan's nomination of Robert H. Bork to the Court, but as chairman of the Judiciary Committee he became an advocate for two new Justices whose views resembled Bork's. (In a speech earlier this month to the Federalist Society, the conservative lawyers' organization, Specter said of the confirmation of Roberts and Alito, "Certainly it was the highlight of the Judiciary Committee under my chairmanship, and it may turn out to be the highlight, certainly one of the highlights, of the Presidency of George Bush.")

Specter's own beliefs appear to have changed little over the years, but he has been forced to work in an environment in which the Republican Party, especially in Congress, has imposed ever-tighter discipline. "When Lyndon Johnson became Vice-President, he wasn't welcome at Senate Democratic caucus meetings anymore, because it was for senators only," Patrick Leahy, the ranking Democrat on the Judiciary Committee, told me. "But every Tuesday since Bush has been President it's been like a Mafia funeral around here. There are, like, fifteen cars with lights and sirens, and Cheney and Karl Rove come to the Republican caucus meetings and tell those guys what to do.

"I'm more of a dog person. Why?"

It's all 'Yes, sir, yes, sir.' I bet there is not a lot of dissent that goes on in that room. In thirty-two years in the Senate, I have never seen a Congress roll over and play dead like this one."

Specter is about to begin his twenty-seventh year in the Senate, and, as its sixteenth most senior member, he has one of the grander offices in the Capitol. His elegant hideaway, behind an unmarked door a few steps from the Senate floor, includes the customary grip-and-grin politician's photographs, but the space is dominated by a more peculiar display: a large blowup of an Op-Ed piece that Specter wrote for the *Times* just before President Clinton's impeachment trial. In the article, Specter proposed a novel solution to the Lewinsky scandal. Congress should abandon its impeachment investigation, Specter asserted; instead, Clinton should face a possible criminal prosecution after his term ended. During the impeachment trial in the Senate, Clinton's lawyers presented Specter's article as a defense exhibit, to encourage Congress to drop its case against the President. "You should have heard the gasps among my colleagues on the Republican side when they introduced it," Specter told me with a laugh.

Specter played a characteristically quirky role in the impeachment saga and, in the process, managed to irritate nearly everyone. Once it was clear that the Senate was going to weigh Clinton's fate, Specter argued in favor of holding a full trial, with witnesses, among them Lewinsky, appearing in front of all the senators. (Democrats, who wanted a quick trial, objected to this idea.) But Specter also appeared unimpressed by the Republican congressmen who served as prosecutors, or managers, of the case against Clinton. He even referred to Lindsey Graham, then a congressman, as "Congressman Lindsey." In the end, Specter cast the most famous vote at Clinton's trial, neither "guilty" nor "not guilty" but, rather, what he called the "Scottish verdict" of "not proven." (It was recorded as a vote against conviction and, thus, for Clinton.) As Specter recounted in his autobiography, a reporter asked him when he left the Senate floor after casting his vote, "Did you anger both sides by doing it this way?"

"'I've had some experience with that,' I replied," he wrote. "The room broke out in laughter."

For Specter, there was another postscript to the Clinton trial. The congressman to whom Specter had condescended during the testimony soon became his colleague in the Senate. And Graham, a former lawyer for the Air Force, became Specter's most determined adversary on the issue of habeas corpus.

"The war on terror is not like any other war," Graham told me. "It's a war without end. There are no capitals to conquer, no navies to sink. The Geneva Conventions say that you need a procedure in place with an independent arbiter making a decision about whether detainees belong in prison. My goal was to create that kind of process, but not in a way that has federal judges making determinations about who is an enemy combatant. I don't think they're competent to make those decisions in a war that is going to go on for a long time. I think that decision belongs to the military."

Unlike Specter, Graham has little apparent reverence for the Senate's recondite procedures and seniority rules. In 2005, as a freshman senator, he bypassed the Judiciary Committee and went straight to the Senate floor with a proposal to ban habeas cases by Guantánamo detainees. After the Supreme Court issued its decision in Hamdan, earlier this year, Graham raised the issue again.

This time, Graham sought to ban habeas cases by the detainees at a moment when Congress was considering a host of other legal changes pertaining to their treatment. Under the Administration's initial plan to hold military trials at Guantánamo, evidence obtained through torture could be admissible. Graham, along with his Republican colleagues John Warner and John McCain, rejected that notion and proposed an alternative. The Bush Administration responded by offering several concessions, including allowing detainees to see all the evidence against them and outlawing the use of evidence that had been obtained by torture or "cruel, inhuman or degrading treatment"—a change meant to assure compliance with the Geneva Conventions. (In the final version of that measure, however, the three Republican legislators agreed to let the military determine whether the conventions had been vio-

lated, a significant concession to the Bush Administration.)

In light of these new rules for trials at Guantánamo, Graham thought that the habeas-corpus filings by the prisoners should stop. "My goal was to create some form of due process that was not as invasive as a habeas trial, because I do believe they impede the running of the jail," he said. Graham proposed that rulings against the detainees be appealed only to the United States Court of Appeals for the D.C. Circuit. (His legislation thus avoided the district court for the D.C. Circuit, which has generally looked more favorably on detainee claims than has the court of appeals.) In Graham's view, the court of appeals is an adequate substitute for habeas corpus. "The way I read what the Supreme Court said was that, if there was no system in place to decide someone's confinement status, you had to let them file habeas petitions," Graham said. "But I think if you give them the D.C. Circuit, that's enough. That's a legitimate alternative. Arlen disagrees. He thinks it's a constitutional right to file a habeas case. I think our statute gives you enough. That's what Specter v. Graham is about."

"That's just ridiculous," Specter told me, referring to Graham's position. "Graham's legislation does not allow the D.C. Circuit to make any fact-finding at all about what happened to the detainees and whether they are, in fact, enemy combatants. It's not a 'streamline' review; it's no kind of review at all." The legislation will almost certainly come before the Supreme Court, but it's impossible to know whether the Court will uphold it. "The D.C. Circuit would have to be an adequate and effective judicial remedy for reviewing the lawfulness of any detention, because that's the basic definition of habeas corpus," Gerald L. Neuman, a professor at Harvard Law School, said. "The law itself isn't very clear about what the D.C. Circuit should do."

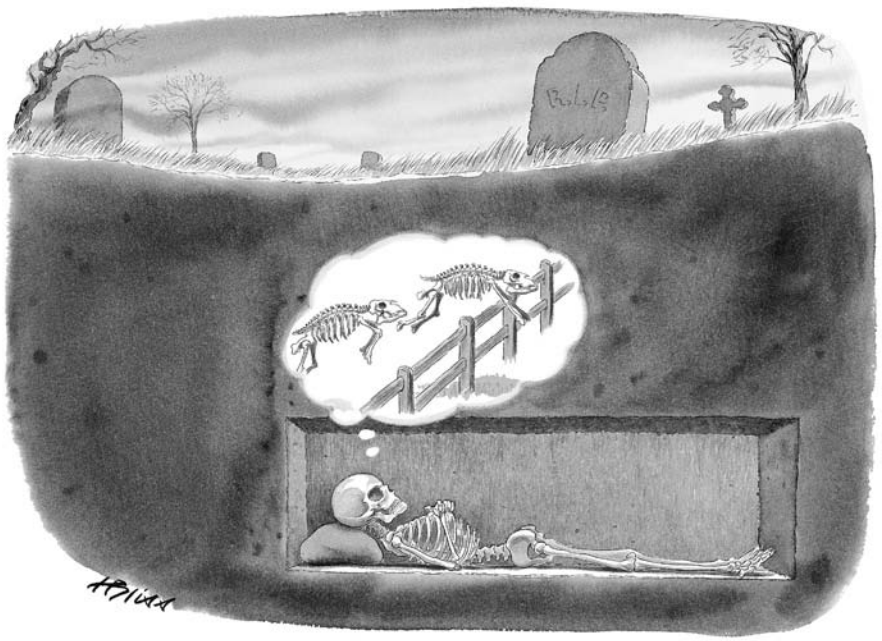
When Specter learned that Graham, with the Administration's support, was trying to ban the detainees from filing more habeas cases, he did everything he could as chairman of the Judiciary Committee to stop the idea, including filing an amendment to the bill. With just a few days' notice, he convened a hearing on the plan to strip the courts of jurisdiction in the detainees' cases. The session took place on September 25th, a Monday morning, a time rarely devoted to Senate business.

The scene in the hearing room of the Dirksen Senate Office Building anticipated, in a small way, the spirit of rebellion that would animate the electorate seven weeks later. The session began with bipartisan expressions of outrage at the Administration's (and Graham's) plan. "It is inexplicable to me how someone can seek to divest the federal courts of jurisdiction on constitutional issues, just inexplicable to me," Specter said in his introductory remarks. "If the courts are not open to decide constitutional issues, how is constitutionality going to be tested?" Patrick Leahy, the ranking Democrat, spoke next. "Today we're addressing the single most consequential provision in this much discussed bill," he said. "This provision would perpetuate the indefinite detention of hundreds of individuals, against whom the government has brought no charges and presented no evidence and without any recourse to justice whatsoever. That is un-American. This is un-American." At that moment, a group of protesters wearing T-shirts saying "Shame," "End Torture," and "Save Habeas Corpus" rose from their seats and cheered.

Specter rebuked them gently. "There will be no demonstrations from the people in the room," he said. "We want you to be here. We want you to listen. But that's out of order."

Until this point, the debate over the Senate bill had focussed on the rules for the commissions, or trials. But Thomas Sullivan, a veteran Chicago lawyer and former United States Attorney, turned the senators' attention to a different subject. Sullivan, who represents several Saudi nationals held at Guantánamo, pointed out that the government planned to give about eighty of the four hundred and thirty detainees full trials. The rest would receive only an abbreviated hearing known as a Combatant Status Review Tribunal (C.S.R.T.). At these proceedings, detainees are not allowed to call witnesses (unless the witnesses are other detainees at Guantánamo), have no attorneys present, and are presumed guilty of being an enemy combatant based on evidence that they are not allowed to see.

With barely concealed rage, Sullivan lectured Senator John Cornyn, the



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Texas Republican who was defending the Administration's position at the hearing. "The question is whether they are enemy combatants. And when they started out in these hearings, these C.S.R.T.s, they were presumed guilty. There had already been a finding they were enemy combatants. The determination had been made. No witness or evidence was presented by the government. They would call in and they'd say, 'O.K., Mr. Cornyn, here's the charge against you. What have you got to say about it?' That was it. That was all that they did. And then they put in some classified evidence. I've been down to the secure facility. It's a joke. It's a sham."

The ban on habeas cases was likely to have a dramatic effect on the detainees at Guantánamo, but for a less than obvious reason. The procedure for military trials, brokered by Graham, Warner, and McCain, has won a measure of support from some of the human-rights advocates and lawyers who have been representing the prisoners. "If they were to charge them under the military commissions, it's a pretty good substitute for a criminal trial," Sullivan told me later. "They have to put evidence on the stand, right to a lawyer, subpoena power, and you can see and confront the evidence against you. But what most people don't understand is that the government has said they are not going to try more than about eighty of the prisoners who are there. The real question is what happens to the three hundred other detainees? All they got are those pathetic C.S.R.T.s."

In introducing the C.S.R.T.s, in 2004, the Department of Defense announced that, as part of the process, "detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States." Because of the new bill, this will no longer be the case. "You're talking about people who have been in custody for four years, some of them haven't even been questioned in two years, and the C.S.R.T. is all they have got in terms of a hearing, and it's all they're likely ever to get," Sullivan said. "Their only hope was habeas, where the government would have to justify in some way why they're being held year after year."

Two days after the hearing by the Judiciary Committee, debate began in the Senate on Specter's amendment to preserve the right of detainees to bring habeas cases. "The right of habeas corpus was established in the Magna Carta in 1215, when, in England, there was action taken against King John to establish a procedure to prevent illegal detention," Specter said. "What the bill seeks to do is set back basic rights by some nine hundred years." As several of his Republican colleagues, including Graham, Cornyn, and John Kyl, of Arizona, rose to support the habeas ban, Specter deftly parried their arguments, without consulting aides or notes.

Kyl asserted that "the consequences of the Specter amendment are unimaginable. We cannot allow enemy war prisoners to sue us in our own courts. Such a system would make it simply impossible for the United States to fight a war." But Specter had an answer. "Mr. President," he said, addressing the chair. "I only need one sentence to refute the arguments of the senator from Arizona, and it comes back to Justice O'Connor's opinion again: 'All agree that, absent suspension, the writ of habeas corpus remains available to every individual'—every individual—'detained within the United States.' Guantánamo was held to be within that concept. But she talks about 'every individual.' That includes citizens and noncitizens."

The outcome of the Specter amendment was in doubt until the day the vote was cast. The final tally was fifty-one to forty-eight against Specter. (Olympia Snowe was absent, attending a funeral.) When the result was announced, Specter, visibly angry, left the Senate chamber. He told reporters that he thought the habeas ban was "patently unconstitutional" and vowed to vote against the detainee bill.

In the chaotic few days before the vote, the Administration's allies in the Senate had toughened the habeas provision of the law. The bill had originally applied only to alleged enemy combatants who were held at Guantánamo. The final version stated that any alien (that is, non-American citizen) who had been seized anywhere and charged with being an enemy combatant would be denied the right to petition for habeas corpus. The definition of "enemy combatant" was also expanded, to include not just those who took up arms but financial supporters of the terrorist cause as well. Accordingly, the bill made clear that aliens arrested in the United States and charged with knowingly giving money to an alleged terrorist organization would be forbidden to sue for their freedom.

Nevertheless, on September 28th, Specter joined all his Republican colleagues (except Lincoln Chafee) in voting for the Military Commissions Act, which passed by a vote of sixty-five to thirty-four. President Bush signed the law on October 17th, and the next day the government began filing court papers asking

for the dismissal of all the petitions for habeas corpus filed by detainees at Guantánamo Bay.

It is hard to believe that the Arlen Specter of the nineteen-eighties—the maverick who defied his party on an issue of the magnitude of the Bork nomination—would have considered yielding on a question as fundamental as habeas corpus. "I was madder than hell when the habeas-corpus amendment went down and was a little hot and spoke prematurely on the vote," Specter told me. "If we had not passed the bill, we would be going on into next year without having a procedure to try these people." Thus, he said, he felt obligated to vote for the bill.

If Specter has accommodated his views to his party's, his leisure habits have not changed: he still plays squash seven days a week, a routine that he has maintained since the nineteen-seventies. "I think of playing squash as making deposits in the 'health bank,'" Specter told me shortly after dawn one recent morning in the locker room of the gym at the Federal Reserve bank, in Washington. "That's a good thing, because I've made a lot of withdrawals, too." In 1993, Specter was found to have a brain tumor and was told that he had three to six weeks to live. However, he recovered quickly after surgery. Then, just after his reëlection in 2004, he was given a diagnosis of Hodgkin's disease, and during the first several months of his tenure as chairman of the Judiciary Committee he received chemotherapy.

Specter completed his treatment in 2005, and never stopped playing squash. The therapy cost him his bushy curls, but his hair is full again, only straight this time. Wearing a ratty sweatshirt, a souvenir from the 1984 Olympic Games in Los Angeles, he looked at least a decade younger than his age. He still bears the scars of his years as a bruiser on the squash court—Senator Robert Packwood once gave him a swat that took six stitches to close—but he now plays more of a finesse game, built around a deadly drop shot. I won our first game, 16–14, but Specter took the next three, to win the match. He plays the same old-school, hardball version of the game as the capital's other celebrated septuagenarian squash enthusiast, Donald Rumsfeld, but the two men have never met on the court.

Specter was about to head to Rhode Island, to campaign for Lincoln Chafee. "I'm going up there to say that Chafee could hold the balance of power in our caucus," Specter told me. "That's what those of us in the middle can do." But in the habeas debate, at the crucial moment, Specter tipped the balance of power toward those who, at the time, already had it. Some Democrats on Capitol Hill are calling the debate Specter's "John Kerry moment." (He was against the habeas bill before he was for it.)

Of course, Specter's vote on habeas, like his support of Roberts and Alito, forestalled another possible conservative revolt against his chairmanship (which, in the event, the election cost him). Specter is hoping the courts will restore the rights of the detainees to bring habeas cases. "The bill was severable. It has a severability clause. And I think the courts will invalidate it," he told me. "They're not going to give up authority to decide habeas-corpus cases, not a chance." Others are less sure.

"It's a pretty odd position for Specter to take," Amar, of Yale Law School, said. "He trusts the courts to take care of a problem when he's voting for something that strips them of their jurisdiction to do it. It's like saying, 'I shot at her, but I knew I was going to miss.' Still, he may be right. The Court might strike it down." According to Amar, the election that cost Specter so much of his clout makes it more likely that his legal position will ultimately be vindicated on habeas corpus.

"The Justices always want to protect their own power, and they hate the idea of any kind of jurisdiction-stripping," Amar said. "But if they can avoid it they also don't want to pick fights with the President and the Congress, especially about anything related to national security. But, with the Democrats in control of Congress, the Court will know that if they strike this down it'll never get passed again in anything like this form. The Republicans would just come back at them and pass the same thing again and again. The Democrats never will. The irony is, thanks to the election, the Court now has plenty of running room to do the right thing."

In the meantime, however, the Administration has moved swiftly to use the new powers granted by Congress in the Military Commissions Act. In acting to dismiss the pending habeas cases filed by Guantánamo detainees, the Justice Department has adopted Lindsey Graham's reasoning, that the bill does not amount to a "suspension" under the Constitution but merely substitutes the D.C. Circuit appeals court for the habeas cases. In a brief filed on November 13th in the D.C. Circuit, the government asserted that the new law "plainly affords an adequate and effective substitute for any applicable habeas right."

The Administration has sought to apply the new law outside Guantánamo. Ali Saleh Kahlah al-Marri, a forty-one-year-old citizen of Qatar, was studying at Bradley University, in Peoria, Illinois, when he was detained shortly after September 11, 2001. He has been held in a Navy brig as an enemy combatant for more than three years, and had filed a petition for a writ of habeas corpus, asking to be freed. On November 13th, the government filed a brief saying that the new law bars Marri's lawsuit: the act "removes federal court jurisdiction over pending and future habeas corpus actions and any other actions filed by or on behalf of detained aliens determined by the United States to be enemy combatants." If this motion is granted, Marri could remain in custody on American soil indefinitely, without any further legal recourse.

Leahy, the incoming chairman of the Judiciary Committee, voted against the Military Commissions Act and denounced its habeas provisions in especially harsh terms. But there are no signs that the new Democratic majority will take on habeas corpus anytime soon. Few Democratic politicians seem enthusiastic about proposing legislation that will principally benefit accused Al Qaeda terrorists, and, in the unlikely event that Democrats passed such a bill, it would face a certain veto from President Bush. The Supreme Court—not Congress—is likely to be the only hope for a change in the law. "This is definitely not going to be the first thing out of the box for us," one Democratic Senate staffer said. "We make fun of Specter, but we're basically leaving it up to the Courts, too." ♦