

The US House Armed Service Committee is holding hearings about the recent Supreme Court decision that Guantanamo Bay detainees cannot be stripped of the habeas corpus provisions. Chairman Ike Skelton, in his opening remarks, will have restored some of the faith in American democracy lost in recent years by the decisions of its Government. They carry faint echoes of the Gettysburg Address to this commentator's ear, and reinforce his opinion that Ike Skelton (whose forebears came from the north east of England) is one of nature's gentlemen that Congress throws up from time to time (see also Senator John Warner and the late Rep Henry Hyde).

He said:

"Two-hundred and twenty years ago, almost to the day, one of our Founding Fathers, Alexander Hamilton, warned that the imprisonment of individuals in distant or unknown locations without due process is a very dangerous engine of arbitrary government. To guard against the tendencies of such governments, Hamilton advocated for the centuries-old power of British courts to order wardens to bring prisoners before it so that a judge, as a neutral third party, could inquire into the basis for continued detention. This is the power of habeas corpus, or what came to be known as the Great Writ.

"The Military Commissions Act of 2006, which was enacted in the last Congress, stripped our federal courts of this bulwark of our Constitution. As a result, the Administration received the green light to be jailer, judge, and jury – and it gladly revved its engine.

"The engine roared until the highest court in our land determined that the price of fuel for that engine was more than our Constitution could bear.

"Last month, the Supreme Court, in a 5-4 opinion, decided that the detainees who are being held at the U.S. Naval Station in Guantanamo Bay, Cuba, do have the habeas corpus privilege under the Suspension Clause of the Constitution and that section 7 of the Military Commissions Act is unconstitutional.

"As a former prosecutor, it is gratifying to know that the federal courts will resume their traditional role of ensuring that only the corrupt remain behind bars. While I still believe the current Military Commission system has some other significant weaknesses, this ruling of the Court will help by ensuring that any commission rulings – which are designed to bring terrorists to justice – can better withstand judicial scrutiny.

"For certainty of convictions must go hand in hand with tough prosecutions.

"In addition to the now largely addressed habeas issue, I have repeatedly identified six other potentially unlawful defects in the current Military Commissions framework.

"First, the Military Commissions Act may violate the exceptions clause under Article III of the Constitution by impermissibly restricting the Supreme Court's review.

"Second, it is questionable whether the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Conventions.

"Third, the provisions regarding coerced testimony may be challenged under our Constitution.

"Fourth, the Act contains very lenient hearsay rules which rub up against the right of the accused to confront witnesses and evidence.

"Fifth, the Act may be challenged on equal protection and other constitutional grounds for how it discriminates against the detainees for being aliens.

"Lastly, Article I of the Constitution prohibits ex post facto laws. That is what this Act may have created.

"Although I do not anticipate that all of these issues will be resolved before high value detainees, like Khalid Sheikh Mohammed, the self-confessed mastermind of 9/11, go to trial, I have confidence that the courts and we in Congress will be deliberate and decisive, rather than recklessly headstrong, in how we approach these difficult questions.

"We must make sure that the verdicts of the military juries stick."

Hear hear!