

Statement of Donald J. Guter
Rear Admiral, Judge Advocate General's Corps, U. S. Navy (Ret.)
Dean, Duquesne University School of Law

Senate Committee on the Judiciary
Hearing on
Restoring Habeas Corpus: Protecting American Values and the Great Writ

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Chairman Leahy and members of the Senate Judiciary Committee, thank you for the opportunity to speak in support of the Habeas Corpus Restoration Act of 2007 (S. 185). Passage of this bill is necessary to repeal provisions of the Military Commissions Act of 2006 that removed this fundamental protection from those detained in the "war on terror." By taking this action we will, as the title of this hearing suggests, protect American values--for habeas corpus is not a special right, it is what we expect for our citizens and military personnel abroad and it is what we should extend to all human beings.

In July 2003, one year after retiring from active duty and having served the final two years of my three decades in service as the Judge Advocate General of the Navy, I had the honor of speaking to about 300 attorneys and guests at the retirement ceremony for our senior military judge at the Washington Navy Yard. In my remarks, I warned of the erosion of civil liberties in the name of security, and I specifically mentioned habeas corpus as a fundamental right that had been suspended temporarily during the War Between the States and during World War II. As we know, each of those wars ended after four years and the equilibrium between security and civil liberties was restored. One key difference in today's struggle is that there is no foreseeable end to terrorism. (We seem to have chosen 9-11 as the beginning of this struggle, but we all know the long history of terrorist attacks on our country and our interests, at home and abroad.)

In 2003, our senior intelligence analysts were already saying that this "war" would be endless. I do not believe anyone could argue otherwise today. Despite my remarks that day, I was confident that congress and the judiciary would temper the predictable erosion of civil liberties that is always fueled by fear. I was proud of my own senator from Pennsylvania, Senator Specter, Senator Levin, and you, Mr. Chairman, when you tried to remove the habeas stripping provision from last year's Military Commissions Act. That effort barely failed; this bill says that it is never too late to do the right thing. The stripping of habeas was an historic and monumental misstep that continues to take us down a path that leads us away from our values and the image we have earned as a nation that promotes and lives by the rule of law.

Just a few weeks ago, on May 4th, the Director of the CIA, General Michael V. Hayden, USAF, came to Duquesne University to deliver the commencement address to the undergraduates. I admire this Pittsburgh native and alumnus, but in my opinion his mixed message illustrates the challenge we face as we seek to achieve a security-civil liberties balance. He described his confirmation hearing using a football metaphor. He said that we could not win the war by playing a foot inside the line, that we had to walk right up to the line, and that sometimes we had to get chalk on our boots. Then he said the following (as quoted from the next morning's Pittsburgh Post-Gazette):

"The defining national security challenge of your generation is terrorism—particularly that committed by al-Qaida, its associates, and those inspired by it. Speaking as the director of an agency whose officers are on the front lines of this war, I can tell you that it won't be won strictly by killing and capturing terrorists. Operations like that are necessary, and we will continue to do them aggressively, effectively, and within the law." But defeating terrorism, he said, means "winning the ideological side of this war, the war of ideas. We must defeat the worldview responsible for producing terrorists who hate America and the principles that we and our partners uphold."

I want to pose a question at this point. How can we "win the ideological side of this war, the war of ideas" with the policies we have adopted since 9-11, policies that are in opposition to our own ideologies, political ideas, and values? Even former Secretary of Defense Rumsfeld questioned whether our tactics and policies are creating more terrorists than we are killing and capturing. And worst of all, the recent study of the mental health of our own Soldiers and Marines indicates that we are eroding their ethics and values. How can we win a war on terror when we are losing the hearts and minds of our own fighting men and women?

The Combatant Status Review Tribunals (CSRTs) and the limited review accorded to them are fundamentally flawed processes. They allow secret and hearsay evidence; evidence acquired through "enhanced interrogation techniques"; lawyers are not permitted to assist the accused; and review is then limited to whether the government has followed its own flawed procedures. Yet these procedures provide the basis for indefinite incarceration. If that is not enough to condemn this entire construct, we have the most recent reports that, after a unanimous finding that a detainee is not an enemy combatant, hearings are repeated again and again until a detainee is classified, to the satisfaction of Pentagon reviewers, as an enemy combatant. Is it really too much to ask, as the Supreme Court opined in June 2004, that detainees are entitled to a "fair opportunity to rebut the government's factual assertions before a neutral decision maker [?]"

When I and other retired military officers took up the cause of preserving habeas corpus, our primary focus was on the detainees at Guantanamo Bay. The Military Commissions Act, however, goes much farther, reaching the 12 million lawful permanent residents in the United States as well as visitors to our country. As a military officer, and today, I enjoy traveling abroad. Next month my wife and I are going to China as part of the Duquesne University School of Law summer program in Beijing. I do not know about

members of this committee, but every time I venture outside our borders, I now consider how we have structured our laws in the United States. In this uncertain world of terrorism, I worry not so much about my physical safety as about whether some country might try to detain me in like manner by bringing allegations that I am then not permitted to challenge in a fair hearing.

Mr. Chairman, I have read your factual “nightmare scenario” in your April 26, 2007, testimony before the Senate Armed Services Committee. This is my nightmare scenario, and I would not wish it on anyone else. At a minimum, I want my country to hold the moral high ground as a platform upon which to argue for my release. In discarding habeas corpus, we are not nibbling around the edges of our valued civil liberties; we are throwing overboard one of our core principles—the right to challenge detention for life without charge.

Let me close with the words and sentiment of the open letter to congress that I signed during the fight we waged against habeas stripping. Other nations look to us for leadership and they follow our lead. We are the bright light of the world. Every step we take that dims that bright shining light undermines our role as a world leader. As we limit the rights of human beings, even those of the enemy, we become more like the enemy. That makes us weaker and imperils our valiant troops, serving not just in Iraq and Afghanistan, but around the globe.

I, therefore, respectfully suggest that passage of the Habeas Corpus Restoration Act of 2007 will not just restore this fundamental human right, it will be a positive factor in restoring our standing in the world community, and it will honor our brave men and women in uniform who fight on our behalf for this and other basic freedoms each and every day.

Thank you.