Testimony of

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TESTIMONY
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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.
Article 1, Section 9, Clause 2
The Constitution of the United States

A persuasive argument can be made that the Writ of Habeas Corpus, the Great Writ, is the single most important bulwark in protecting our rights and freedoms. It is virtually sacrosanct, and those who have suspended it have often been treated harshly by history. That is why these hearings are so important and the action Congress is being asked to take is so momentous. This is an historic moment.

The Great Writ breathes life into all our fundamental and most cherished rights and freedoms. None of them have value if potential violations can't be tested in court. What value is Freedom of Speech if those who speak out are incarcerated and not able to have their cases heard?

As with all our rights, we must be tremendously cautious when we consider picking and choosing who may enjoy them and be protected by them.

It is too facile to say that the men detained in Guantanamo "are all terrorists," "the worst of the worst, and "all killers." Maybe they are. Maybe they aren't. The point of habeas corpus is to answer those questions. If we strip them of that right and the courts of jurisdiction to hear their cases, we will never know the answers to those very important questions.

In World War II, when thousands and thousands of German and Italian POWs were imprisoned in various camps throughout the United States, we didn't suspend habeas corpus. There is only one recorded case of a POW using habeas to test his imprisonment. He was an Italian American and his petition was denied. The prisoners knew that their detention was lawful and that habeas petitions would therefore be futile. No prisoner contested the very fact of being an enemy soldier, as many of the Guantanamo detainees do. And there were no allegations in those prison camps of abuse, coercive interrogation, sleep deprivation, and induced hypothermia.

The fact is that it is not at all obvious to many Americans and to the world community that all the detentions at Guantanamo are as clearly justified as those in World War II or in other conflicts. The existence of the right of habeas corpus will go a long way to resolving those concerns; conversely, eliminating that right will only give rise to greater concern and doubt.

There are two ways to consider the question of stripping the courts of their jurisdiction to hear habeas petitions.

One analysis is legal. Is it constitutional? The other is pragmatic. Even if it is legal, is it wise? I believe that the legislative proposal that Congress is being asked to pass is both unconstitutional and, more importantly, unwise.

The constitutional test is two pronged. One prong is whether we are in a situation of invasion or rebellion. The other is whether the public safety is jeopardized. Both have to exist in order to empower Congress to legally suspend habeas.

Rebellion clearly does not pertain. Nor have we been invaded in such a way as to justify suspension of the writ of habeas corpus. While on September 11, 2001 we were attacked in a most horrific way, the detainees presently incarcerated in Guantanamo were not picked up in the United States. They were picked up elsewhere and we brought them to Guantanamo presumably against their will. Most certainly had no direct connection to 9/11 and such a connection certainly cannot be presumed. Although others attacked us on our soil, these individuals did not invade the United States. The Constitution cannot be read to mean that if there is an invasion, habeas can be suspended over five years later for all aliens in U.S. custody. Even if they are determined unilaterally to be enemy combatants, that status does not necessarily mean they had anything to do with the attack on 9/11. The proposed legislation is without temporal, geographic or common sense limitations. This fails the "invasion" test.

Although the public safety is threatened by terrorists generally, there must be a clearer nexus between the public safety and the individuals for whom the writ is being suspended.

Even if they may have posed a danger in the past, the men detained at Guantanamo no longer present a danger to American citizens, other than perhaps their guards. They are in a very, very secure place ninety miles off our shore. If they exercise their right to test their detention and are determined to be a threat, then they will be returned. If they are not a threat, then by definition the public safety is not compromised. We cannot create the requisite danger to public safety by importing them to Guantanamo. That is not what the Framers of the Constitution envisioned.

Nor is it reasonable to argue that the public safety is jeopardized by overwhelming our court system with frivolous habeas petitions from the detainees. They are represented by respected lawyers from some of the most prestigious law firms in the country. These lawyers are doing their work generally on a pro bono basis. They have no desire to waste their time or the courts' time on clearly bogus matters. The experience in World War II demonstrates this. Habeas provides no comfort for prisoners who are legally and properly imprisoned.

On the other hand, these lawyers are extremely dedicated and will eagerly devote their own and court time to fundamental and important questions of the basis for suspect incarceration. That's the way it should be.

This fails the public safety test.

As important as it is, in some respects the constitutional argument is subordinated to an even more profound rationale. Even if stripping the courts of their habeas jurisdiction were constitutional and therefore within the authority of Congress to do, it is simply not a wise action for Congress to take for several reasons.

Perhaps first and foremost is that if we fail to provide a reasonable judicial avenue to consider detention, other countries will feel justified in doing the same thing. While obviously we don't expect al Qaeda to provide habeas corpus rights or anything remotely equivalent to their captives, we must remember this is not the last war the United States will fight. Plato said only the dead have seen their last war. Moreover, it is U.S. troops who are forward deployed in greater numbers and on more occasions than all other nations combined. It is our troops who are in harm's way and deserve judicial protections. In future wars, we will want to ensure that our troops or those of our allies are treated in a manner similar to how we treat our enemies. We are now setting the standard for that treatment.

Moreover, it is inconsistent with our own history and tradition to take this action. If we diminish or tarnish our values, those values that the Founders fought for and memorialized in the Constitution and have been carefully preserved by the blood and honor of succeeding generations, then we will have lost a major battle in the war on terror. There has never been a time when it is more important for us to remember who we are. We owe that both to honor the memory of the men and women who gave us those rights and to the hope for our progeny for whom we must preserve and protect them. We don't want to leave them a diminished Constitution.

This is also bad policy. The Constitution sets up a carefully structured system of checks and balances between the three branches of government. We can't gainsay the fact that the balance naturally and unavoidably shifts through time and by events. But Congress must be very reluctant to affirmatively shift the balance. Balances and the laws of physics being what they are, there inevitably will be a readjustment looming in the future.

Indeed, I'm also surprised anyone is suggesting jettisoning habeas corpus because it actually provides a reasonable way for us to extricate ourselves from the Gordian knot we have tied around our hands in dealing with long term detention.

As we all know, the Global War on Terror will not end anytime soon, and we may not even recognize the end when it comes for some time. We have a problem which is that we have detained hundreds of people, the vast majority of whom will never see the inside of a military commission hearing room, and we don't know what to do with them. In Vietnam, where a large number of captives were taken into custody while dressed as civilians, we afforded them a hearing process in keeping with Article 5 of the Third Geneva Convention, the so-called "competent tribunal," to determine whether we were holding the right people on proper grounds.

The military has scrupulously followed that requirement in all our recent conflicts since Vietnam. For example, in the last Gulf War, we conducted about 1200 of these hearings, and found in 75% of the cases that the detainees were innocents picked up in the fog of war. We don't have that process now. The Combatant Status Review Tribunal is neither an adequate substitute for a court hearing nor is it an adequate substitute for an Article 5 competent tribunal held in close time and geographical proximity to the capture. The question I keep hearing around the country is, "What are we going to do with all these guys." We are now talking about closing off our one escape route. Let the courts handle it.

I testified last July before the Senate Armed Services Committee on the question of military commissions. At that hearing a number of Senators and witnesses, including me, pointed out that the United States has the undeniable right to hold enemy combatants. Indeed, theoretically we could prosecute a detainee at a military commission, acquit him, and still continue to hold him. That scenario becomes significantly less palatable if there is no reasonable recourse to have their status examined.

Contrary to popular opinion, the CSRTs are not a reasonable substitute. They presume the evidence against the prisoner is accurate and that he is an enemy combatant. He must rebut those presumptions without benefit of counsel and even if the evidence against him is secret or obtained by torture or coercion. "Enemy combatant" includes unknowing or unintentional support of al Qaeda.

Finally, we all know that the vast majority of detainees will never be prosecuted in a military commission. Their fates will never be resolved by an impartial court. We will create the Kafkaesque situation wherein Saddam Hussein and Moussoui will be afforded greater rights than the least significant detainee in Guantanamo who will be held indefinitely without access to a court.

That necessarily raises the question of why strip the courts of habeas jurisdiction. One might assume that we are afraid the courts will make a mistake and release a dangerous man, viz., that we don't really trust the courts. Even if that were a legitimate concern, which I don't think it is, does that justify holding hundreds of men forever without legitimate recourse?

Another rationale may be that we don't have the evidence to support the incarcerations in the first place. Many of these men, if not most of them, were caught up in dragnets, or turned over by war lords or neighbors in exchange for lucrative bounties.

I certainly do not argue that all these men are innocent of any wrongdoing or that they should not be incarcerated. I am simply arguing that the Supreme Court has held that they have the right to have their incarceration examined by a court and we shouldn't take it away. If petitions are heard and denied and detainees are returned to Guantanamo, that's fine with me. Justice will have been done and the Constitution served.

Note well what you are considering here. The proposed legislation is clear. If we say you are an alien and we take you into custody as an enemy combatant, you have no recourse to test any of those allegations. We don't need to do this. America is too strong. Our system of justice is too

sacred to tinker with in this way. At a time with the United States is threatened from without is the time we must cling most tightly to the fundamentals of our democracy and humanity.