

Testimony of
William H. Taft IV

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SENATE COMMITTEE ON THE JUDICIARY
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Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss the provisions of the Military Commissions Act relating to judicial review of the detention of persons at Guantanamo Bay. I testified recently on this subject before the House Committee on Armed Services. I welcome the interest that both houses of Congress are taking in this matter. Briefly, I believe it was a mistake for Congress to take away from the detainees at Guantanamo the ability to obtain judicial review by habeas corpus of the lawfulness of their detention, and I recommend that Congress restore it.

As I understand it, under present law detainees convicted by military commissions may obtain judicial review of their convictions after their criminal cases are concluded, and persons who are not charged with crimes, or have perhaps been acquitted of crimes, but detained as enemy combatants pursuant to determinations of their status by Combatant Status Review Tribunals may obtain review of those determinations. That review, however, does not accord the detainee the same opportunity to challenge his detention that he would have in a normal habeas corpus proceeding. Before the enactment of the Military Commissions Act last year, detainees were entitled under the Supreme Court's interpretation of the relevant authorities to have the lawfulness of their detention reviewed after filing petitions for habeas corpus. The benefits of this displaced procedure were considerable, not so much for the detainees in Guantanamo - none of whom was released by a court -- as for establishing beyond argument the legitimacy of holding persons who continued to present a threat to the United States as long as the terrorists continue to pursue their war against us.

It should be recalled, in considering this question, that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and the Taliban as long as they pose a threat to the United States. This is black letter law of war. Prior to the enactment of the Military Commissions Act, consistent with this principle, no court had ordered the release of any of the detainees. Nor will they do so as long as it is shown that the detainee poses a threat in the ongoing conflict. Currently, this determination is made by the military with only very limited judicial review of the proceedings of the Combatant Status Review Tribunal involved. Having the determination made by a court following established habeas procedures would greatly enhance its credibility and be consistent with our legal tradition.

Beyond that, providing habeas corpus review of the limited number of cases at Guantanamo will impose only a very modest burden on the courts. Fewer than four hundred people are currently

detained at Guantanamo, and I understand that a substantial number of these may soon return to their own countries. By comparison, the courts handle many thousands of habeas petitions each year. As I say also, the cases are comparatively straightforward. Many detainees freely state that they would try to harm the United States if they are released. Others are known to be members of al Qaeda, have been captured while attacking our troops, or are otherwise known to pose a threat to us. In short, I have to believe that each of the detainees at Guantanamo is there for a good reason. Judicial review of such cases should be relatively uncomplicated when compared with the voluminous trial and appellate records involved in most habeas cases. In the event, however, that a court were to be presented with a case that raised serious questions about the lawfulness of detention, surely those questions should indeed be carefully considered, and no institution is better equipped by experience to do that than a court.

In proposing that we return to the system that was in place previously, I want to stress that I do not believe this issue should be treated as a constitutional one, but simply as a matter of policy. Whether Congress has the power to bar habeas review to aliens detained in Guantanamo is a question that will be resolved by the courts. My guess is that it probably does, but five justices of the Supreme Court could eventually let us all know whether I am right or not. But Congress should not want to bar the habeas review the Supreme Court found the aliens in Guantanamo were entitled to under our statutes. It should want, instead, to have the judiciary endorse the detention of the terrorists who threaten us. For the very reason that the law of war allows us to detain persons without charging them with criminal conduct for extended periods, it is all the more important to be sure that the process for determining who those people are is beyond reproach. Unlike wars between national armies, where it's easy to tell who the enemy is, identifying those terrorists we are entitled to detain because they have declared war on us is more difficult. We should take advantage of the courts' expertise in performing this task.

One final point. The Supreme Court's decision of last summer involved detainees at Guantanamo and found that because of the special status of that installation, the habeas process was available to detainees there under our laws. It did not consider, much less determine, whether it was available in foreign lands or on the battlefield. Speaking again as a matter of policy, I think it would be entirely impractical to extend it to battlefield captures or persons being held in foreign countries in the context of an armed conflict. In the unlikely event that the Supreme Court were to decide that it did so extend, I would certainly support a statute amending the statutory provisions on which the Court relied for its conclusion.

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It is often said that the war with the terrorists calls for new approaches, melding traditional law enforcement procedures with the law of war. Guantanamo is a good example of this. The detainees there are held pursuant to the law of war, but the term of their detention is so long and indeterminate that it has many of the characteristics of a criminal punishment. The fact that each terrorist has made an individual choice to fight us, rather than being conscripted by his government, reinforces this criminal law perspective. Extending habeas review to determine the lawfulness of detaining the terrorist combatants, as has not been done in previous wars for enemy prisoners, seems to me an appropriate acknowledgement of the new situation that the conflict with the terrorists has created for us.

Mr. Chairman, thank you for this opportunity to appear before your committee. This concludes my testimony. I look forward to answering your questions.