

STATEMENT OF DAVID A. KEENE

SUBMITTED May 21, 2007

My name is David A. Keene. I am currently serving both as Chairman of the American Conservative Union and Co-Chair of the Constitution Project's Liberty & Security Initiative. I am submitting this statement to urge your support for the restoration of the *habeas corpus* jurisdiction eliminated by the Military Commissions Act (MCA).

Since 9/11 the Executive Branch has requested and Congress has granted extraordinary powers to identify, pursue and eliminate threats to the safety of this country and her citizens. Data mining, controversial aspects of the USA Patriot Act, the establishment of Military Commissions and tremendous leeway in the treatment of terrorists and suspected terrorists have all been sought in the name of fighting the war on terror.

I am one who believes that Congress has been correct in granting much of the power sought because of the need to deal with a new kind of enemy in an age of technological advancements that might otherwise have given our enemies an advantage that we could not match. The foiling of numerous follow-up attempts by terrorist elements and the fact that we have successfully avoided another attack on our citizens within our borders is testimony to the effective way in which those charged with our protection have pursued their mission using the traditional and newly granted powers available to them.

On the other hand, I believe it is wise at all times to look at any request for more governmental power critically if not cynically. Those charged with protecting us naturally want all the power and flexibility they can get to pursue their mission and forget that in protecting us there always exists the danger that they and we will forget or damage the essence of what we are and what they are trying so desperately to protect.

Throughout our history, there have been those who in times of danger have been all too willing to trade some of the freedoms that make up the core of the American experiment for just a little more security and those charged with providing that security

have always been ready and willing to broker the exchange. They are willing because they believe in their mission and want to do all that is humanly possible to accomplish that mission and there is little doubt that traditional, constitutional and legal strictures designed to protect the rights of the innocent and guilty alike make their job a little harder than might be the case if they didn't have to observe those limits. But it is those guarantees and those limits on the power of government that make this country unique in world history. It is that uniqueness that they are charged with protecting.

A few days after the terrorist attacks in New York and here, then Defense Secretary Don Rumsfeld said that if we changed the way we live as a result of the terrorist threat we face, the terrorists will have won. The question we have to ask as we pursue victory over those who would destroy our way of life and the values that make our way of life possible is whether the steps we take to achieve victory risk the destruction of who we are. It is vital that we preserve the traditional American constitutional and common law rights that have made our regard for human liberty unique in world history.

Earlier this year, I was pleased to join with a broad, bipartisan group of more than forty-five legal and policy experts in a statement urging restoration of the *habeas* jurisdiction stripped by the MCA. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

Throughout our nation's history, the "Great Writ of *Habeas Corpus*" has served as a fundamental safeguard for individual liberty by enabling prisoners to challenge their detentions and to obtain meaningful judicial review by a neutral decision maker. *Habeas corpus* rights have been recognized for non-citizens as well as citizens. Thus, in 2004, in the case *Rasul v. Bush*, the United States Supreme Court upheld the jurisdiction of federal courts to hear *habeas corpus* petitions filed by Guantanamo detainees to challenge the lawfulness of their indefinite detentions.

However, the MCA passed by Congress last fall included a provision eliminating *habeas corpus* for certain aliens held by the United States as "enemy combatants."

Although I agree that our government must and does have the power to detain foreign terrorists to protect national security, repealing federal court jurisdiction over *habeas corpus* does not serve that goal. It is crucial that we maintain *habeas corpus* to ensure that we are detaining the right people and complying with the rule of law.

In fact, *habeas corpus* review is especially important now *because of* the particular nature of the current “war on terrorism.” Studies of the Defense Department’s own documents show that the majority of the Guantanamo detainees were not captured on the battlefield, and many were turned in by bounty hunters.

Moreover, this conflict has no foreseeable end, which means, quite simply, that our government is claiming the power to imprison people without charge indefinitely, potentially forever. *Habeas* review can help separate the “wheat” from the “chaff” and ensure that our government only detains people when it has a proper legal and factual basis for doing so. If we are to hold people indefinitely without charge, we should at the very least ensure there is a meaningful process to determine that we are holding the right people.

The executive branch argues that it has provided an adequate substitute for *habeas* review through the Combatant Status Review Tribunal (“CSRT”) hearings and the limited review of these decisions by the U.S. Court of Appeals for the D.C. Circuit. This claim is absurd. The token review provided by the CSRT process does not even approach the meaningful judicial review that would be provided by restoration of *habeas corpus*. First, the CSRT process lacks the basic hallmarks of due process. Among other problems, it relies on secret evidence, denies detainees the chance to present evidence in their favor, and prohibits the basic right of the assistance of counsel. In addition, the process permits the tribunal to rely on evidence obtained by coercion. Second, the D.C. Circuit’s review is limited to what will inevitably be an inherently flawed record created by the CSRT. Unlike a U.S. district court judge hearing of a *habeas corpus* petition, the D.C. Circuit

cannot consider evidence or make its own findings of fact, and, therefore, it cannot rectify the CSRT's inherent procedural flaws.

Restoring *habeas corpus* is also important to protecting Americans overseas. The United States cannot expect other nations to afford our citizens the basic guarantees provided by *habeas corpus* unless we provide those guarantees to others. America's detention policy has undermined its reputation in the international community and weakened support for the fight against terrorism, particularly in the Arab world. Restoring *habeas corpus* would help repair the damage and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy.

Having said this, however, I am concerned not so much by what others might think of us or do as a result of our policies, but of what the cavalier dismissal of fundamental rights says about who we are.

Therefore, I urge Congress to restore the *habeas corpus* jurisdiction that was eliminated by the Military Commissions Act because of who we are and what this great nation represents. Congress should act to preserve our constitutional system of checks and balances, and restore this established and traditional avenue of judicial review.