

**TESTIMONY OF DAVID A. KEENE, CO-CHAIR OF THE
CONSTITUTION PROJECT'S LIBERTY & SECURITY INITIATIVE**

HEARING ON HABEUS CORPUS AND GUANTANAMO BAY

**BEFORE THE
HOUSE ARMED SERVICES COMMITTEE**

JULY 26, 2007

STATEMENT OF DAVID A. KEENE

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).

I am here today because as a conservative I believe that ours is the greatest and freest nation on the face of the earth and because I want to do what I can to make sure that my children and their children will be able to say the same.

I am here today because as a conservative, I believe we can defeat our enemies without compromising the values that have made this nation great.

As citizens, we owe it to ourselves to support realistic measures needed to protect our nation, but men and women of goodwill regardless of party or ideological orientation must work together to make certain that our rights survive the stresses of the war in which we are today engaged and the zeal of those who in fighting it sometimes forget that it is to preserve these very rights that our fighting men and women go to battle.

Since 9/11 Congress has granted the Executive Branch 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 would ask that the statement, signed by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances be included in the record of this hearing. 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.

I am here today not to question the validity of holding terrorist suspects at Guantanamo Bay, but to urge that those we do hold have the ability to seek an objective review of the legality of their incarceration.

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.

Those who argue against extending habeas rights to those held at Guantanamo like to describe those incarcerated there as among the most dangerous of our enemies and suggest that anything that might lead to the premature release of any of them would constitute a dire and immediate threat to our national security. I have no doubt that some of those held there are enemies who deserve to be where they are, but the purpose of a habeas hearing is not to release the guilty but to separate the innocent from the guilty.

The picture of the prisoners being held there one gets from a review of evidence available from official sources the testimony of those responsible for running the prison at Guantanamo Bay contradicts this picture.

Many of those being held there were apprehended and shipped to Guantanamo without any proof whatever that they ever even intended to engage in actions against us or our allies. The Defense Department says that there is evidence that about 8% of them actually fought against us with Al Qaeda, but that fully 55% have never committed any hostile act against the United States. Many of these people have been in prison for five years or longer and under current plans may be held indefinitely without ever being brought to trial for anything at all and the CIA reported as long ago as October of 2002 that most of the prisoners we are holding at Guantanamo “don’t belong there.”

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. 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. You can do that by supporting H.R. 2826 and urging your colleagues to support it when you report it out of committee. Congress should act to preserve our constitutional system of checks and balances, and restore this established and traditional avenue of judicial review.