KEEP HABEAS CORPUS

Statement of

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For centuries the ancient writ of habeas corpus has enjoyed a favorable press as an indispensable check on arbitrary executive power. Unfortunately, the Great Writ is under attack today as an outdated luxury we cannot afford. The "compromise" on military tribunal legislation recently announced by the Administration and Senators Warner, McCain and Graham (S. 3039) would throw the writ overboard. We might have expected this from the Administration, because it has consistently made overbroad claims of executive power. What is surprising, and unaccountable, is that the Senators, who have struggled to maintain other important checks on presidential power, are also prepared to jettison habeas. Congress should not pass the legislation without fixing it to save this fundamental guarantee.

Ordinary people naturally respond with blank stares to that Latin mouthful, habeas corpus ad subjiciendum. But that phrase loses all of its obscurity – and none of its punch – when expressed in plain English: "Produce the body that it may be subjected to examination." The writ grew up in England, long before the American Revolution, in order to counter the power of the Crown to arbitrarily imprison and execute its foes. Historically the writ did so by directing the officer of the Crown who has custody of a prisoner to bring the prisoner into court. Once there an impartial judge could make an independent determination of whether there exists an adequate basis in law and fact for the prisoner's confinement. If the judge found the detention unlawful, the judge could order the prisoner freed then and there.

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[1] Submitted for the record of the hearing of the Senate Judiciary Committee, "Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review," Sept. 25, 2006. Professor Epstein's articles and books include "Executive Power on Steroids," *Wall Street Journal*, Feb. 13, 2006; "Executive Power, the Commander in Chief, and the Militia Clause," 34 Hofstra L. Rev. 347 (2006); and *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books, 1998). Professor Epstein's telephone number is (773) 702-9563. His email address is repstein@ midway.uchicago.edu.

Modern American practice has relaxed the requirement that the prisoner literally be brought into court at the outset of legal proceedings. Today, the prisoner may obtain a judicial hearing attended by lawyers for both sides to decide on the legality of the confinement. Customarily, the writ is issued only after the finding on legality goes against the government. But notwithstanding the procedural changes, the older concerns with excessive state power still animate the modern practice. Imprisonment, second only to infliction of death, is the hallmark of state power. In any system of limited government, that loss of liberty should be hedged about with strong procedural protections unless some grave public necessity requires its suspension.

The proposed military commission legislation would abolish the use of the writ of habeas corpus to review the confinement of alleged "unlawful enemy combatants" held at Guantanamo, leaving those prisoners to rot in jail, perhaps indefinitely. In the place of habeas review, the proposed legislation calls for an optional system of limited judicial review that the government can easily avoid. That judicial review system kicks in only if the government (1) triggers an internal status-review process to determine whether a prisoner is an "unlawful enemy combatant" and (2) carries that review process through to a "final decision." The legislation does not require the government to do either. But if the government does not do both, the legislation allows it to hold any prisoner – even if not actually an unlawful enemy combatant – in custody for the rest of his life, with no due process and no recourse to the courts. No one deserves that fate.

Far more is at stake than lawsuits haggling over prison conditions. At stake is the fundamental right of any prisoner to test the lawfulness of his detention. Truth must count. Innocence must matter. An optional system of limited judicial review sidesteps both. Only habeas corpus can meet the need. To strip the federal courts of habeas jurisdiction for individuals captured in the war on terror would tear a hole in a fundamental guarantee of liberty. Unless we remain true to our own constitutional tradition, our efforts to advance the cause of freedom will be seen a cynical exercise in hypocrisy.

And what is that constitutional tradition? The Constitution states that the writ of habeas corpus can be suspended only when rebellion or invasion endangers public safety. Take that message to heart, and beware of hyperbole. There is a world of difference between the risk of some future terrorist act and a present invasion on American soil. We have many effective ways to deal with terrorist threats as long as our institutions are in good working order, as they are today. An aggressive foreign policy abroad, and lawful surveillance at home, can go a long way to reduce the terrorist threat, without trenching on key personal liberties. No current disorder or unrest blocks the use of ordinary judicial processes.

We only weaken our cause by treating national challenges, even extraordinary ones, as emergencies that require suspension of ordinary judicial processes. Habeas corpus is not meant to condone illegal actions. Nor does the writ provide that anyone who gets a hearing as of right is entitled to a release as of right. No, retaining habeas corpus is part of a vital effort to remain faithful to our constitutional traditions when they matter most, in times of trouble. Congress should reject all proposals to curtail it.