STATEMENT OF BRUCE FEIN

BEFORE THE SENATE JUDICIARY COMMITTTEE

RE: HABEAS CORUPUS FOR ALLEGED ENEMY COMBATANTS

SEPTEMBER 25, 2006

Mr. Chairman and Members of the Committee:

I oppose suspending or crippling the writ of habeas corpus for alleged enemy combatants. Not a crumb of evidence has been adduced suggesting that the writ would risk freeing terrorists to return to fight against the United States. On the other hand, volumes of evidence demonstrate a non-trivial risk that suspending the writ risks illegal lifetime detentions. No civilized nation has an interest in detaining any person—citizen or alien—in violation of law. If the law is deficient, it should be changed. But due process should not be crucified on a cross of political expediency.

The history of liberty is the history of procedural protections.

English Kings were notorious for "disappearing" subjects in dungeons. The Great Writ of habeas corpus answered that abuse by enabling detainees to challenge the factual and legal foundations for their detentions before impartial judges. The Writ enjoys a hallowed history. It was initially mentioned in the Magna Charta of 1215. It was enshrined in the Constitution by the Founding Fathers. It is not dependent on any act of Congress. The Writ may be suspended only by an express act of Congress "when in cases of rebellion or invasion the public safety may require it." (It cannot be seriously maintained that Al Qaeda has "invaded" the United States or has disabled the civil courts from functioning).

Habeas corpus is not a "get out of jail" free card. The petitioner is saddled with the burden of demonstrating a factual or legal deficiency in the executive's justification for detention. The burden is formidable. State and federal prisoners file thousands of habeas petitions annually, but only a tiny percentage result in release, typically in cases of actual innocence proved by DNA testing or otherwise. Federal judges are neither dupes

nor guileless. They readily see through concocted tales, for example, an enemy combatant's claim that he was on the battlefield to deliver first aid or as a tourist guide. Judges are as much repulsed by terrorists as are legislators or executive officials.

To be sure, habeas petitions filed by alleged enemy combatants are more likely to implicate classified or top secret information than typical prisoner petitions. But federal courts for decades have successfully managed criminal and civil cases involving such sensitive information under the Classified Information Procedure Act or otherwise. The pending indictment against "Scooter" Libby is illustrative. Indeed, then Assistant Attorney General for the Criminal Division, Michael Chertoff, in testifying about President Bush's executive order creating military tribunals in the aftermath of 9/11, lavished praise on federal courts for their adeptness in presiding over terrorism cases without compromising national security.

In sum, neither experience nor intuition nor logic suggests that habeas corpus for alleged enemy combatants would endanger the public safety. Indeed, the reason for curtailing the Great Writ as elaborated by Senator Lindsey Graham is to relieve federal courts from hearing frivolous claims, not to avoid freeing enemy combatants. And even the argument about frivolity is unconvincing. Frivolous claims filed by state or federal prisoners are routinely dismissed without a hearing.

To preserve the Great Writ for enemy combatants is not to exalt form over substance. Enemy combatants may be erroneously detained for at least three reasons. Ethnic, tribal, political, or religious adversaries may have supplied the United States military with false information. Further, terrorists routinely operate amidst civilian populations. That loathsome tactic creates a non-trivial risk that American soldiers in the

heat of battle may mistake an innocent civilian for an Al Qaeda member or supporter. Finally, the executive may exaggerate incriminating evidence and ignore the exculpatory for political effect. The greater the number of enemy combatants detained, the greater the public appearance that the fight against international terrorism is succeeding. In politics, optics is everything. That seems to be the explanation for the misidentification of Canadian Maher Arar as a terrorist and his deportation by the United States to Syria, where he was tortured.

Jose Padilla similarly was initially detained by President Bush as an enemy combatant. But that designation has been dropped in favor of a criminal prosecution for allegedly providing material support to a listed terrorist organization. If Padilla is convicted, habeas corpus will be available to challenge the legality of his verdict or sentence.

The Defense Department has released scores of detainees after internal reviews discredited the belief that they were enemy combatants. Former Guantanamo commander General Jay Hood and deputy commander General Martin Lucenti have been quoted as agreeing that "a large number" of Guantanmo Bay detainees "shouldn't be there…and have no meaningful connection to al Qaeda or the Taliban."

President Bush and Members of Congress might contend, nevertheless, that a vote against enemy combatants by crippling habeas corpus would be popular. Few voters care about mistreatment or misapprehension of aliens who subscribe to Islam. A corresponding sentiment carried the day when President Franklin Roosevelt and a Democrat Congress voted to intern 120,000 Japanese Americans in World War II to

appease racial bigotry. Congress later apologized in the 1988 Civil Liberties Act and made monetary amends.

Does this Congress wish to ape the French Bourbon royalty, who forgot nothing and learned nothing, by cynically suspending the Great Writ for political advantage in November? The rule of law is at its zenith when it refuses to bend even for the most reviled.

I have attached a Commentary article I recently authored for The Washington Times that amplifies on my prepared statement. I would also urge the Committee to consider bills addressing the National Security Agency's warrantless surveillance program separate from habeas corpus because they raise distinct issues. A Senator may favor one but oppose the other, just as a Senator might support the war in Afghanistan, but voice reservations over the war in Iraq. Separate votes will best reflect the sentiments of the Senate as a whole on each discrete issue.