U.S. House of Representatives
Committee on the Judiciary

TESTIMONY OF
WILLIAM H. TAFT, IV
HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
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Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss legal issues related to the detention of persons captured in our conflict with al Qaeda and other terrorist organizations. My testimony will address two issues specifically – first, whether upon the filing of habeas corpus petitions courts should determine the lawfulness of detaining persons at Guantanamo Bay and, second, how those persons who are lawfully detained should be treated.

Before the enactment of the Military Commissions Act last year, detainees in Guantanamo 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 procedure were considerable, not so much for the detainees – 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 fight 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. Currently, whether a person poses a threat to us is determined 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. 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, practically all of the detainees at Guantanamo are 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 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 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 is more difficult. We should take advantage of the courts' expertise in performing this task.

Regarding the standard of treatment for detainees, I believe we should have followed our practice in previous wars of treating all captured persons in accordance with the Geneva Conventions and the Army Field Manual applying them, whether or not they were entitled to this. Any state, after all, can designate its enemies as "unlawful combatants". In fact, North Vietnam and Iran have led the way in this practice in recent years, but we should not follow them. Our own servicemen, diplomats and ordinary citizens will pay the penalty. They will be abused, tortured and perhaps never even accounted for. For more than half a century, the United States was a leader in opposing the use of torture and coercive methods of interrogation against those captured in conflict. We need to reclaim our reputation.

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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. How we decide who will be detained and how we treat them in our custody provides a good example of this. Detainees 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, which addresses itself to personal responsibility. Extending habeas review to determine the lawfulness of detaining the terrorist combatants, as has not been done in previous wars, 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 the subcommittee. This concludes my testimony. I look forward to answering your questions.