Statement of Mariano-Florentino Cuéllar
Associate Professor and Deane F. Johnson Faculty Scholar
Stanford Law School
before the
Senate Committee on the Judiciary
concerning
Restoring Habeas Corpus: Protecting American Values and the Great Writ
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Mr. Chairman, Senator Specter, and members of the Committee on the Judiciary:

Thank you for inviting me to address the relationship between habeas corpus, executive discretion, and national security – an issue that has occasioned much debate among legal scholars, lawyers, lawmakers, and the public in recent years. This issue has taken on particular urgency given the recent passage of the Military Commissions Act (MCA).1 Section 1005(e)(1) of this Act strips American courts of jurisdiction to consider habeas corpus applications involving aliens accused of being enemy combatants, effectively allowing any decisionmaker appointed by the President to detain an alien indefinitely by merely accusing her of being an enemy combatant. In what follows, I analyze this provision in light of history, American legal traditions, and the institutional realities affecting the performance of executive bureaucracies.

Americans have been reluctant to tamper with the writ of habeas corpus even in the nation's darkest hours. In 1866 the Supreme Court took up the case of individuals who plotted an attack on military installations in the midst of the Civil War. 2 Despite the difficult circumstances at the time, our nation did not deny the accused combatants a chance to use the writ to argue their case. Although the writ of habeas corpus had been suspended during the Civil War, Congress did so only in a limited territory and for a short time. Even so, the Supreme Court further restricted the scope of habeas suspension, concluding that Congress lacked the power to impose emergency procedures when civilian courts were open and capable of conducting business. Since that time, as Americans faced new security challenges, the writ continued to be enshrined in constitutional doctrine and congressional statute. It was used by American citizens as well as aliens, by combatants as well as noncombatants, and by individuals held within the borders of the United States and beyond those borders, in territories under the control of the United States.3

These historical episodes underscore an important lesson: that Congress and the American people have confronted major security threats without eviscerating the writ of habeas corpus. In rare circumstances, when Congress has explicitly suspended the writ in accordance with the Constitution, it has done so with limited scope and for limited durations. While neither the elected branches of government nor courts have acted perfectly during our history, the overarching story reflected in the history of habeas corpus is one of balance. In that story, vigorous responses to dangers confronting the nation are checked by constitutional and statutory protections against arbitrary executive detentions. The MCA has eroded that longstanding commitment to balance.

To grasp the extent of this erosion, one must appreciate that the development of a robust habeas corpus doctrine predates the American Republic. At English common law, courts exercised habeas jurisdiction not only within a state's formal territorial limits, but also over any areas where a government exercised sovereign control.4 Since early in our own history, American constitutional law assigned an important role to habeas corpus in vindicating due process interests. Habeas corpus was explicitly recognized in the Constitution, which prohibits any suspension of the "Privilege of the Writ of Habeas Corpus… unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, 9, cl. 2. Further developments in the doctrine have expanded habeas corpus beyond its 18th century limits. At its core, however, the writ has remained a vehicle for reviewing the legality of executive detention, and thereby, for creating an administrative and judicial mechanism vindicating critical due process interests.5

The preceding history underscores why the MCA raises such serious constitutional questions. The gravest questions arise from the MCA's purported restrictions on habeas review of detentions involving aliens in the United States. Another possible problem involves provisions constraining courts' consideration of the applicability of the Geneva Conventions. Our institutional architecture makes it essential for Congress to consider these problems instead of simply leaving them to the courts, which were not designed to be the only branch concerned with constitutional principles.6

Just as constitutional rights can be placed at risk by problematic statutes or arbitrary executive actions, so too can such rights be appropriately safeguarded through statutory mechanisms that ensure a proper balance between the need for vigorous executive action and accountability. The intimate connection between constitutional protection and external checks on executive authority helps explain the resilience of statutory habeas provisions. The writ of habeas corpus has acted as a check on executive power in a surprising array of historical circumstances, involving citizens as well as aliens, enemy combatants on U.S. territory, and enemy combatants outside the U.S. but within its functional jurisdiction.7 In short, the statutory history of habeas corpus gives effect to both constitutional protections as well as a

broader concern with the need for accountability.

In contrast, the MCA's habeas-stripping provisions reflect little attention to balancing the interests of the state with those of accused individuals, and even less attention to the multiple ways in which those provisions can erode accountability, and public perceptions of legitimacy at home and abroad. By eviscerating external checks on the detention of aliens accused of being enemy combatants, the MCA engenders perceptions abroad that the U.S. detainee process is unfair, further eroding American legitimacy. Our history underscores the foreign policy benefit of securing equal protection and fair procedures. For example, Cold War policymakers pressed aggressively to expand domestic civil rights protections in order to bolster America's global standing.8 Indeed, recognition of the connection between balanced legal procedures and favorable public perceptions lies at the heart of our nation's military doctrine.9

The problems with the MCA's habeas-stripping are compounded by the characteristics of bureaucratic organizations. Executive bureaucracies routinely benefit from external review when they are making complicated decisions. Conversely, the absence of some external check on bureaucratic performance permits, and even encourages, a variety of pathologies. In the past, such pathologies have given rise to nuclear safety violations, the destruction of the Space Shuttle Challenger, biased regulatory rules, and mistaken detentions.10 Even when decisionmakers possess laudable motivations, the pressures and constraints that organizations face can distort the work of executive agencies. Instances of outright malfeasance and bad faith may be rare in detentions. Nonetheless, the absence of external review makes it easier for some decisionmakers to promote appealing impressions of their effectiveness by subtly downplaying errors when they do occur, and for still others to simply fail to correct mistakes that cannot be reliably discovered without an external check.11 Yet neither the MCA nor the Defense Department's implementing regulations have established a credible system auditing detainee decisions to manage the risks created as a result of restrained external review. Moreover, the justification for eviscerating habeas review is unpersuasive. Specifically, there is no compelling reason to believe that habeas review would overburden the detention system. History has instead shown such review to encompass a measure of flexibility, with courts adjusting its stringency to account for practical circumstances.

Finally, the MCA in its present form even has the potential to impact the status of many ordinary lawful permanent residents in the United States. While the MCA was justified primarily on the basis of facilitating our government's efforts to detain individuals captured on foreign battlefields or actively undertaking terrorist operations, the literal terms of Section 1005 actually confer exceedingly vast powers to detain a far different pool of people. Section 1005(e)(1) permits the indefinite detention of any alien accused of being an enemy combatant. Such accusations can include open-ended, indirect offenses, including material support of terrorism and conspiracy. 12 While provisions for punishing such offenses already exist under federal criminal law, some of the potential problems with open-ended, indirect offenses in that context are mitigated by the presence of external review and more demanding evidence standards. The MCA lacks both. Moreover, the MCA permits detentions of alleged enemy combatants to continue indefinitely because no limit is placed on detentions before there is a determination of whether the individual is in fact an enemy combatant. The MCA specifically exempts from its coverage those individuals who are considered to be "lawful" combatants.13 The problem with this provision is that the framework set up by the MCA insulates from meaningful review the very determination of whether an individual is in fact a lawful combatant.

Taken together, these features may permit the creation of a massive unaccountable detention system that could be used against any one of the millions of U.S. lawful permanent residents who have left their homelands in Latin America, Asia, Africa, and Europe to become legal members of American society. The history of these lawful permanent resident communities has been marked by significant contributions to American life as well as concerted efforts for legal and social inclusion.14
The MCA cuts against such inclusion. It may seem unlikely that the MCA would be used against numerous individuals in these communities with little or no connection to terrorism. But just as the history of law in America shows a strong commitment to habeas corpus, so too does that history demonstrate how laws are often used in a manner different from what was once contemplated. Recently, for example, the Inspector General of the Justice Department reported that the FBI was using National Security Letters under the Patriot Act for purposes that did not involve terrorism.15

Although the preceding observations augur in favor of restoring habeas protections, it is worth acknowledging some of the objections that have been raised to such a move. Some observers question whether habeas corpus should have much application outside the context of traditional domestic criminal law. In fact, habeas corpus has not been confined to traditional criminal proceedings at all. Enemy combatants have sought habeas relief just as individuals convicted in domestic criminal proceedings have.16 Nor is it the case that jurisdiction over habeas review is confined strictly to a nation's territory. As the Supreme Court explained in Rasul, both British and American precedents establish that habeas jurisdiction can extend to areas within a nation's sovereign control but beyond its borders. Giving the present system an opportunity to demonstrate its effectiveness without restoring habeas is also difficult to justify, as habeas review has proven to be critical in revealing the flaws of detention systems in the past.17 Finally, there is little basis for concerns that restoration of habeas would open the floodgates to challenges from individuals held by the U.S. abroad. While the Court in Rasul established that even detainees in Guantanamo merit access to the writ, the holding turned

primarily on the unusual degree of United States authority over Guantanamo, where our nation indefinitely exercises complete control and jurisdiction by the express terms of its agreement with Cuba. The holding is therefore unlikely to be extended to areas where the United States is not exercising authority and control similar to what our nation wields in Guantanamo.

Even if the preceding objections to restoring habeas corpus are not persuasive, it is important to acknowledge the security challenges we Americans face at this point in our history. The solution to the risks of arbitrary executive coercion made possible by the MCA is not to dismiss the threat posed by those who would harm America or its residents. It is instead to pass the Habeas Restoration Act, and more generally, to be mindful of the need for balance in this crucial area of law. Such balance can be better assured if Congress carefully weighs the risks that laws will be used in unintended ways – far removed from their original justification – and if Congress considers the value of continuing a long tradition of legislative respect for the role of habeas review as an external check on the bureaucratic power to coerce and detain. History shows a nearly unbroken pattern of Congressional respect for the great writ. Now is the time to restore that legacy.

Thank you very much. I would be pleased to answer any of your questions.

1 10 U.S.C. §§ 948-950 (2006).
2 Ex Parte Milligan 4 Wall. 2, 18 L. Ed. 281 (1866).
3 See Ex Parte Milligan, 4 Wall. at 2, Ex Parte Quirin, 317 U.S. 1 (1942), In re Yamashita, 327 U.S. 1 (1942), Rasul v. Bush, 542 U.S. 466 (2004).
4 See King v. Overton, 1 Sid. 287, 82 Eng. Rep. 1173 (K.B. 1168); King v. Salmon, 2 Keble 450, 84 Eng. Rep. 282 (K.B.1669)].
5 See INS v. St. Cyr, 533 U.S. 289, 301 (2001).
6 See generally LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).
7 See Zadvydas v. Davis, 533 U.S. 678 (2001), INS v. St. Cyr, 533 U.S. 289 (2001), Ex Parte Milligan, 4 Wall. at 2, Ex Parte Quirin, 317 at 1, In re Yamashita, 327 U.S. at 1, Rasul v. Bush, 542 U.S. at 466. While enemy combatants have been given leave to apply for habeas relief and general prisoners of war have not, the latter benefit from the protections of the law of war, which entitle them to a status determination soon after capture in the field.
8 See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61(1988).
9 See U.S. Army's Counterinsurgency Manual, quoted in Letter from Rear Admiral Don Guter, USN (Ret.) et al. to the Honorable Patrick Leahy, Chairman, Senate Committee on the Judiciary, United States Senate, Washington, DC 20510 (March 7, 2007).
10 See generally SCOTT SAGAN, THE LIMITS OF SAFETY: ORGANIZATIONS, ACCIDENTS, AND NUCLEAR WEAPONS (1993); CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES (1984); DIANE VAUGHAN, THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA (1996); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993);
OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003).
11 See Mariano-Florentino Cuéllar, Auditing Executive Discretion, 82 NOTRE DAME L. REV. 227 (2006).
12 Section 950v (25).
13 Section 948a (2).
14 See Graham v. Richardson, 403 U.S. 365 (1971).
15 OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007).
16 Ex Parte Milligan, 4 Wall. at 2, Ex Parte Quirin, 317 at 1.
17 See Rasul, 542 U.S. at 466.