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FOR JUSTICE

WHITE PAPER:

TEN THINGS
YOU SHOULD
KNOW ABOUT
HABEAS CORPUS

by Jonathan Hafetz

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TEN THINGS YOU SHOULD KNOW ABOUT HABEAS CORPUS

Introduction:

The writ of habeas corpus protects individuals against unlawful exercises of state power. Since pre-revolutionary American history, habeas has guaranteed people seized and detained by the government the right to question the grounds for their detention. It has been available to citizens, non-citizens, slaves, alleged spies, and alleged enemies alike. Habeas is so fundamental to America that the Framers wrote the writ into the Constitution. Indeed habeas is the *only* common law remedy enshrined in the Constitution.

Twice in the past two years, however, Congress has passed statutes limiting habeas rights for a single class of prisoners. The Detainee Treatment Act of 2005 (“DTA”)¹ and the Military Commissions Act of 2006 (“MCA”)² limit federal courts’ jurisdiction to hear petitions filed by foreign nationals detained as “enemy combatants.” More, these suspensions are permanent – not limited to a timebound, immediate emergency.

These two statutes were passed amid a swirl of confusion and misinformation about habeas corpus – what it is, who uses it, what role it plays in our constitutional order, and why it is important. Is habeas a neat trick by which America’s enemies can out get out of jail and back to the business of undermining our country? Or are the hundreds of men who have been held, without charge, simply asking for a meaningful hearing on the legality of their imprisonment?

This white paper seeks to explain facts and to correct misperceptions. Once policymakers and the public understand habeas corpus, they will see why it is essential to preventing abuses of executive power, preserving America’s values, and giving the fight against terrorism the legitimacy it needs to succeed.

Bills to restore habeas corpus have already been introduced in both houses of Congress. Ongoing lawsuits challenging the legality of the MCA and DTA are making their way through the courts. But Congress should not wait for the outcome of what will no doubt be more protracted court battles. Lawmakers should act now to repeal the recent habeas-stripping provisions of the Military Commissions and Detainee Treatment Acts and restore habeas to its rightful, historic, and fundamental place in American law.

TEN THINGS YOU SHOULD KNOW ABOUT HABEAS CORPUS

1. HABEAS CORPUS IS A CORNERSTONE OF AMERICAN LAW.

Habeas corpus traces its roots to 1215 and the signing of the Magna Carta. It was designed to keep kings from using power in an unchecked and arbitrary way. Habeas, simply put, is a means for a person detained by the state to require that the government demonstrate to a neutral judge that there is a legal and factual basis for his detention.

The Founders fought a revolution against the kind of excessive and arbitrary executive action habeas prevents. In the Declaration of Independence, they objected to King George III's abuse of his detention power.³ In the *Federalist Papers*, Alexander Hamilton declared habeas corpus a "bulwark" of individual liberty, calling secret imprisonment the most "dangerous engine of arbitrary government."⁴ That government power demanded a legal check was, to the Framers, "self-evident." So, at the Constitutional Convention in Philadelphia, no one debated whether to include habeas in the Constitution. The delegates instead discussed only what conditions, *if any*, could ever justify suspension of the writ.⁵

With unmistakably clarity, Article 1, Section 9 of the Constitution enshrines habeas:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁶

Habeas corpus has been suspended on only the rarest of occasions in American history and only temporarily. It was suspended twice during the Civil War, at a time when Washington, D.C. was surrounded by Confederate Virginia to the west and mobs in Maryland threatened to cut off supplies and troops to the capitol. It was also suspended after the Civil War when armed insurrectionists made it impossible for courts to function in the South; decades later, in the early 1900s, during an armed rebellion in the Philippines; and one final time in 1941 in Hawaii, immediately after Pearl Harbor.⁷ Each time, Congress responded to an present and immediate emergency. Each time, Congress specifically limited suspension to the duration of the emergency that necessitated it. And, each time, Congress made a determination that the public safety required suspension of this most fundamental right.

In short, habeas is at the core of America's laws and Constitution. It has rarely been suspended, and then only in the face of an active, outright insurrection. Repealing it, therefore, is not a casual act. Permanent suspension of habeas corpus departs radically from the course of American history and the intentions of those who wrote the Constitution and established our laws.

2. POST 9/11 LEGISLATION CREATES UNPRECEDENTED RESTRICTIONS ON HABEAS RIGHTS.

Are the recent statutes similar to the earlier restrictions on habeas corpus? Unfortunately, no. They are far more dramatic incursions on this core constitutional right.

First, the Executive has never before today claimed the power to *permanently* deny detainees basic rights.

Second, the Executive has never sought to deny habeas rights to a singled-out class of people. The Detainee Treatment and Military Commissions Acts eliminate the writ of habeas corpus for individuals unilaterally designated “enemy combatants” by the President.

Third, the Executive has never before claimed the power to eliminate habeas corpus without finding that the public safety required it.

The President’s interpretation of the statutes extends far beyond even what Congress intended. In passing the habeas-stripping provisions of the MCA and DTA, lawmakers sought to prevent habeas petitions from those detained at Guantanamo Bay and elsewhere outside the United States. Now, the

Bush Administration claims these provisions go further, potentially depriving even legal immigrants within this country of habeas corpus. If true, this would mean U.S. officials could pick a man off the street anywhere in the United States and imprison him as an “enemy combatant” for years without any right to challenge his detention before a federal judge.

In fact, government officials have sought to do precisely that. In June of 2003, for example, the President designated as an “enemy combatant” 41-year old Ali Saleh Kahlah al-Marri, a Qatari national, who arrived in the United States, with his wife and five children, on a student visa to study at Bradley University in Peoria, Illinois.⁸ Though Mr. al-Marri was first arrested on fraud-related charges, the charges were dropped when, weeks before his trial was scheduled to commence, the President declared him an “enemy combatant.” For the last four years, Mr. al-Marri has been detained indefinitely without charge and in solitary confinement at a military prison in South Carolina. Now, the government argues, the MCA prevents Mr. al-Marri even from invoking habeas corpus to contest his potentially lifelong imprisonment.⁹

The MCA and DTA restrict habeas rights in an unprecedented way. Earlier laws imposed procedural limitations on habeas rights available to those convicted of crimes. (For example, a 1996 law known as the Anti-Terrorism and Effective Death Penalty Act set stricter time deadlines for habeas petitions, and restricted prisoners’ ability to file another petition after one had already been denied.)¹⁰ But until now, no American law left individuals detained by the Executive without *any* legal means to challenge their detention.¹¹

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(LATIN: [WE COMMAND THAT] YOU HAVE THE
BODY) IS THE NAME OF A LEGAL ACTION OR
WRIT BY MEANS OF WHICH DETAINEES CAN
SEEK RELIEF FROM UNLAWFUL IMPRISONMENT.
HISTORICALLY, THE WRIT OF HABEAS
CORPUS HAS BEEN AN INSTRUMENT FOR
SAFEGUARDING INDIVIDUAL FREEDOM
AGAINST ARBITRARY STATE ACTION.

3. HABEAS PROTECTIONS EXTEND TO FOREIGN NATIONALS.

Contrary to many misperceptions, habeas corpus rights have extended to those who are not United States citizens.

The Supreme Court has previously reviewed the habeas petitions of foreign nationals detained by the United States during armed conflict. In two separate World War II cases, for example, the Court reviewed habeas petitions filed by foreign nationals including a group of Nazi saboteurs and a Japanese general accused of war crimes. Though the Court in these cases, *In re Yamashita*¹² and *Ex parte Quirin*,¹³ ultimately rejected the petitioners' claims, habeas review was nonetheless available to review the lawfulness of the detainees' situation.

The Administration principally and mistakenly rests its claim that habeas rights do not apply to Guantanamo detainees on another World War II case, *Johnson v. Eisentrager*.¹⁴ This case was brought by a group of German soldiers who had been captured and convicted in China and who were imprisoned in Germany. In denying their habeas petitions, the Supreme Court noted that all of the prisoners were admitted enemies of the United States and that all had been tried and convicted by a military court.

The current detention of "enemy combatants" is very different. An overwhelming majority of prisoners at Guantanamo deny they are enemies of this country; all but a handful have never been charged with any crime, let alone been tried by any court. Most will never be charged.¹⁵ In addition, the prisoners in *Eisentrager* were held in Germany; the Guantanamo detainees, by contrast, are imprisoned in territory over which the United States government exercises complete and exclusive control and jurisdiction – territory that, in the words of Supreme Court Justice Anthony M. Kennedy, "is in every practical respect a United States territory."¹⁶ For those detainees who seek to contest their designation as "enemy combatants," the United States is the only sovereign that can hear their cases or order them freed if they are wrongly imprisoned.

4. THE SUPREME COURT HAS MADE IT CLEAR THAT HABEAS EXTENDS TO ALLEGED "ENEMY COMBATANTS."

In *Hamdi v. Rumsfeld*, the Supreme Court held that an individual captured during active combat in Afghanistan had the right to habeas corpus to determine whether his detention remained within "the permissible bounds" of the law.¹⁷

What are the legal limits of the "enemy combatant" category? The Bush Administration defines this category so broadly that it would include a person who, for example, innocently donated money to a charity that he did not realize was secretly financing terrorist activities. In *Hamdi*, the Court made clear that the proper scope of the "enemy combatant" definition is subject to independent judicial review.

The Supreme Court also ruled in *Hamdi* that habeas requires sufficient factual evidence to sustain a prisoner's detention. The Court explained that detainees must receive notice of the allegations against them and a meaningful opportunity to rebut those allegations before a neutral decision maker.¹⁸ Habeas, the Court made

clear, thus helps ensure that errant tourists, embedded journalists, local aid workers, and others captured amid the chaos of a foreign war zone are not mistakenly swept up and wrongly detained.¹⁹

Hamdi was an American citizen. But in another decision, *Rasul v. Bush*, the Supreme Court made clear that habeas extends to foreign nationals held as “enemy combatants.” Noting that “Executive imprisonment has been considered oppressive and lawless” since Magna Carta, the Court affirmed the right of Guantanamo detainees to challenge their indefinite imprisonment through habeas corpus.²⁰ Emphasizing that the detainees insisted that they were “wholly innocent of wrongdoing,” the Court made it clear that there was just as good a chance that innocent foreigners, as well as American citizens, could be imprisoned by mistake.²¹

5. HABEAS PROTECTIONS ARE MORE – NOT LESS – ESSENTIAL DURING THE KIND OF INDETERMINATE CONFLICT IN WHICH WE ARE NOW ENGAGED.

The United States has, President Bush says, never before fought a war like the Administration’s current “Global War on Terror.”²² According to the Administration, this struggle has no clearly identifiable enemies, no recognizable battlefields, and no foreseeable end. It is precisely the indeterminate, open-ended nature of the struggle that increases the risk that government officials will inadvertently detain innocent civilians on the basis of unfounded suspicion, innuendo or mistake.

And, since the Administration says the “Global War on Terror” will last for generations, mistakes are thus of greater – possibly life-long – consequence to those wrongly deemed “enemy combatants.”

Some detained at Guantanamo are without doubt enemies of this country. But, disturbingly, there is much evidence that many, if not most, detained there are in fact innocent of any connection to terrorism—and that the government has long been aware of this. A confidential CIA memo written in 2002, for example, reported that most of the Guantanamo detainees “didn’t belong there.”²³ A former Guantanamo commander went further: “Sometimes we just didn’t get the right folks.” But, the Commander explained, people remained in detention because: “Nobody wants to be the one to sign the release papers. There is no muscle in the system.”²⁴

Habeas is the muscle on which prisoners have relied throughout American history.

Restoring habeas review would protect this country – along with the citizens of the world – from the possibility that innocent people might mistakenly spend indeterminate terms – possibly *entire lives* – in prison, without charge, under the control of the United States government.

6. HABEAS PETITIONS ARE NOT FRIVOLOUS PRISONER CONDITIONS SUITS.

As Congress debated the 2005 and 2006 laws, many legislators appeared to believe that prisoners routinely use habeas petitions to file frivolous complaints about prison food or insufficient Internet access. “Crazy lawsuits out there.” That’s what Senator Lindsey Graham said about lawsuits in which Guantanamo detainees

supposedly complained about slow mail service and the quality of medical services.²⁵

In fact, habeas petitions are categorically different from prison lawsuits.

Prisoners often raise quality-of-life issues through lawsuits. They sometimes seek money damages. Congress previously curbed such suits. The Prison Litigation Reform Act, passed in 1995, limited prisoners' access to the courts. But a habeas petition is different. In essence, it asks, "Can this person be detained?" It does not ask "how" that detention should proceed. Habeas thus goes to the far more elementary question of whether there is a basis in fact and in law to hold a person in the first place. To be sure, in the habeas petitions filed by Guantanamo detainees, some of the detainees' lawyers have raised disturbing questions about prolonged isolation, brutal forced feeding of those engaged in hunger strikes, and other improper practices.²⁶ In so doing, they are simply ensuring they can zealously represent a client whose wishes they can discern. And this small number of cases indicates more about abusive interrogations and other problematic practices than it does about any possible danger that the habeas right will be abused for frivolous purposes.

7. HABEAS CORPUS STRENGTHENS NATIONAL SECURITY BY GIVING LEGITIMACY TO THE FIGHT AGAINST TERRORISM.

In his leaked 2003 memo, then Secretary of Defense Donald Rumsfeld asked a pointed question that should guide future counter-terrorism policy:

Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?²⁷

The sense that the United States is a country that honors the rule of law and basic human rights has long been one of our greatest foreign-policy assets. But in the global struggle against al Qaeda and its affiliates, the idea that the United States no longer plays by its own rules is a huge recruiting boon to our enemies. Allegations of torture and images from Abu Ghraib have led to a state in which, as former Secretary of State Colin Powell said, "The world is beginning to doubt the moral basis of our fight against terrorism."²⁸ Donald Rumsfeld's successor, Robert Gates, warned that the treatment of those detained at Guantanamo "taints" the fight against terrorism and deprives this country of international credibility.²⁹ (Gates urged that the Guantanamo facility simply be closed.) Disregarding longstanding constitutional protections simply offers new ammunition to those who assert the United States is a lawless hyper power.

Worse, there is strong reason to believe that the effort to strip habeas rights from detainees is in fact an effort to hide unlawful conduct. According to a leaked Justice Department Memorandum from December 2001, the Administration decided to hold individuals as "enemy combatants" at Guantanamo precisely because, it believed, prisoners there would be beyond the protections of American law and, in particular, habeas corpus. In its memo, two Justice Department lawyers wrote that if a court reviewed the detentions, it might find some of them illegal under the Geneva Conventions and other legal obligations.³⁰

The creation of whole classes of people who can be held without habeas corpus or any other guarantee of fundamental rights undermines the United State's moral authority as well as its credibility as a defender of

liberty. People around the world judge us by our deeds, not our words. By subjecting detention decisions to habeas review, the United States demonstrates that the fight against terrorism is legitimate and that we are detaining the right people, an obvious predicate step to gaining the broad support necessary for success.

8. THE FEDERAL COURTS CAN HANDLE CLASSIFIED EVIDENTIARY ISSUES IN HABEAS CASES.

For decades the federal courts have safely managed criminal and civil cases involving classified and top secret information. Such cases have been resolved fairly and expeditiously and without compromising national security.³¹ Numerous recent examples of the courts' effective protection against disclosure of classified evidence include the prosecution of individuals charged with bombing U.S. embassies in Kenya and Tanzania. In each instance, courts effectively protected against the disclosure of classified information without inhibiting the government's ability to convict the defendants.³²

The federal habeas statute and rules give federal judges specific tools to control and safeguard information. They also set out a workable, streamlined series of procedures for evidentiary issues.

Effective procedures have already been developed for detainee cases involving "enemy

combatants." Federal District Judge Joyce Hens Green who presided over early cases involving Guantanamo detainees, issued a protective order in 2004 that ensured secure storage, handling and control of classified national security information.³³ The protective order, the product of extensive negotiations between lawyers for the detainees and for the United States and consideration of legal briefs from both sides, has since governed all of the more than two hundred habeas cases filed by or on behalf of Guantanamo detainees. It includes measures to prevent the inadvertent disclosure of classified information while enabling detainees to present evidence of innocence to a federal judge with the assistance of counsel. It provides an example of how liberty and security can successfully be balanced in the federal courts.

ALEXANDER HAMILTON DECLARED
HABEAS CORPUS A "BULWARK" OF INDIVIDUAL
LIBERTY, CALLING SECRET IMPRISONMENT
THE MOST "DANGEROUS ENGINE
OF ARBITRARY GOVERNMENT.

9. CONGRESS HAS NOT CREATED AN ADEQUATE SUBSTITUTE FOR HABEAS CORPUS.

The Military Commissions and Detainee Treatment Acts do not provide an adequate substitute for habeas corpus. Quite the reverse: these laws sanction indefinite imprisonment without due process and allow rendition

to other countries for torture and other mistreatment.

Under the new statutes, “enemy combatants” can seek review in the U.S. Court of Appeals for the D.C. Circuit. But both statutes limit the scope of that review in crucial ways. These laws confine judicial review to the record of facts created by a Combatant Status Review Trial (“CSRT”), a summary military proceeding devised in 2004 by the Executive precisely to avoid habeas review.³⁴ The CRST lacks key protections against erroneous decisions: They simply do not, and cannot, serve as fair fact-finding instruments. For example, the CRST requires that

the detainee prove himself innocent of allegations he cannot even see. A detainee has no counsel in CRST hearings. He has no right to present witnesses or evidence in his own defense.³⁵ The government did not produce any witnesses at any CRST hearings and, in 96% of the cases, failed to provide any documentary evidence.³⁶ In

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addition, the CRST allows for the use of evidence gained by coercion and even torture.³⁷ Any detention review scheme that is grounded on acceptance of CSRT findings will necessarily be fundamentally flawed, and cannot provide the basic protections against unlawful executive detention that habeas has historically afforded.

As written, the MCA and DTA do not allow the CSRT records to be supplemented even if available evidence proves the detainee’s innocence or shows that he confessed after prolonged abuse and/or torture. Court review limited in these ways undermines the integrity of the Judiciary by denying federal courts the basic tools necessary to actually review questionable practices and findings. Today, only the scrutiny of an *independent* federal judge on habeas corpus will be sufficiently credible to warrant further detention.

The new statutes also slow the judicial process. For many detainees, this means prolonging their wrongful imprisonment. The D.C. Circuit recently ruled that the MCA eliminates habeas corpus jurisdiction over the Guantanamo detainee habeas cases.³⁸ The Supreme Court decided not to review this decision at the present time. In so doing, the Court indicated that prisoners at Guantanamo should first go back to the D.C. Circuit.³⁹ But that court has already ruled that the detainees have no constitutional rights, so exhaustion of the DTA and MCA’s limited remedies will almost certainly be futile. The Supreme Court may eventually review the D.C. Circuit’s decision, but Congress doesn’t need to – and should not – wait for the Court to act. It should instead restore habeas corpus now and provide the lawful process that should have been provided at the outset.

In addition, the new statutes enable other questionable government conduct, including “extraordinary rendition,” a process in which the United States turns detainees over to the custody of other countries where they are likely to be tortured.

Where habeas is available, courts can at least review prisoner transfers to ensure that they comply with the

United States' legal obligations, including the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, a treaty signed by more than 140 nations.⁴⁰ The new laws, however, eliminate this important check along with other habeas protections, thus enabling the Executive to render prisoners for torture or continued imprisonment without due process.

10. CONGRESSIONAL ACTION IS THE MOST EFFECTIVE WAY TO RESTORE HABEAS CORPUS.

Upholding the Constitution is the business of Congress as well as the Judiciary. As it did during the civil rights movement, Congress can – and should – play a key role in fulfilling America's commitment to equal treatment and justice under law. Congress is poised to play the most expeditious role it can by restoring habeas and protecting a writ that protects us all from the possibility that we might be subject to the unchecked whim of a government stronger than its individual citizens.

Congress has an equal duty to uphold the Constitution and enact wise policy. It should not simply delegate that job to the courts. The 2006 election was a demand for accountability in foreign policy. It was a call, from voters, to right the balance between the Executive and the other branches. The laws stripping habeas rights from a single class of people is among the most egregious evidence of a period when the Executive was unchecked, unbalanced, and hence lawless.

CONCLUSION:

Misperceptions about habeas corpus have sometimes obscured its essential role in American law and society. But habeas corpus is central to our values and traditions, commitment to due process, and respect for the rule of law. We cannot abandon it now.

Habeas does not merely safeguard individual liberty against wrongful detention. It helps protect our system of checks and balances by curbing abuses by the Executive, something particularly important at a time in which fears of terrorism make excess more likely.

Habeas enhances counter-terrorism efforts by helping ensure the United States lawfully detains those who threaten our security. Doing so will help legitimize those efforts and restore our international credibility.

The unconventional, unlimited nature of the Administration's so-called "Global War on Terrorism" makes habeas *more*, not less important. Congress can and should repeal the court-stripping provisions of the Military Commissions and Detainee Treatment Acts and restore habeas corpus today.

ENDNOTES

- ¹ Pub. L. No. 109-148, 119 Stat. 2680 (2005).
- ² Pub. L. No. 109-366, 120 Stat. 2600 (2006).
- ³ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).
- ⁴ THE FEDERALIST No. 84 (Alexander Hamilton) (Clinton Rossiter ed. 1961).
- ⁵ *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (M. Farrand ed. 1966) (no suspension except “on the most urgent occasions, and then only for a limited time not exceeding twelve months”) (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (habeas corpus “inviolable” and should never be suspended) (proposal of John Rutledge).
- ⁶ U.S. CONST. art. I., § 9, cl. 2.
- ⁷ William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 149, 178 n.190 (1980).
- ⁸ The Brennan Center is lead counsel for Mr. al-Marri.
- ⁹ Adam Liptak, *In A War With Vague Boundaries, A Terror Detainee Longs for Court*, N.Y. TIMES, Jan. 5, 2007, at A1.
- ¹⁰ The Brennan Center does not support the Anti-Terrorism and Effective Death Penalty Act’s restrictions on post-conviction relief which, particularly in death penalty cases, plays a vital role in safeguarding constitutional rights and preventing unjust results.
- ¹¹ The Anti-Terrorism and Effective Death Penalty Act, like another statute enacted several months later, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, also purported to restrict the right of certain immigrants to judicial review of their deportation orders. The Supreme Court concluded that the acts did not repeal immigrants’ right to habeas corpus, noting that such legislation would raise “serious constitutional problems” under the Suspension Clause. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).
- ¹² *In re Yamashita*, 327 U.S. 1 (1946).
- ¹³ *Ex parte Quirin*, 317 U.S. 1 (1942).
- ¹⁴ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
- ¹⁵ In more than five years, only ten of the more than seven hundred individuals who have been detained at Guantanamo have been charged with a crime. Those ten detainees were charged before military commissions. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). After the Supreme Court invalidated the commissions in *Hamdan*, Congress enacted the MCA, providing the statutory authorization for military commissions that the Court found was previously lacking. Three detainees have since been charged before military commissions and one, David Hicks, has pled guilty.
- ¹⁶ *Rasul v. Bush*, 542 U.S. 466, 487 (2004).
- ¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality opinion).

- 18 *Id.* at 533.
- 19 *Id.* at 534.
- 20 *Rasul*, 542 U.S. at 475 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting))
- 21 *Id.* at 485.
- 22 The Brennan Center rejects the proposition that from a legal standpoint there is such a thing as a “war on terror” or that United States can be at war with an international terrorist organization like al Qaeda. However, even assuming that there is a “war on terror,” or global armed conflict against a transnational terrorist group such as al-Qaeda, habeas corpus must exist to ensure that this “war” is conducted with in legal limits and that individuals are not wrongfully detained.
- 23 Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House’s War on Terror*, THE NEW YORKER, July 3, 2006.
- 24 Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1.
- 25 National Defense Authorization Act for Fiscal Year 2006 - Conference Report, 151 Cong. Rec. S14256, 14262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham).
- 26 *See, e.g.*, Tim Golden, *Guantanamo Detainees Stage Hunger Strike Despite Force-Feeding Policy*, N.Y. TIMES, Apr. 9, 2007, at A12.
- 27 Walter Shapiro, *Rumsfeld Memo Offers Honest Display of Doubts About War*, USA TODAY, Oct. 24, 2003, at 5A.
- 28 David Jackson & Kathy Kiely, *Strategy on Terror Suspects Splits GOP; Key Senators Say No to Bush Plan*, USA TODAY, Sep. 15, 2006, at 1A.
- 29 Thom Shanker & David Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. TIMES, Mar. 23, 2007, at A1.
- 30 *See* “Possible Habeas Jurisdictions over Aliens Held in Guantanamo Bay, Cuba,” Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Patrick F. Philbin and John C. Yoo, in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29 (Karen J. Greenberg & Joshua L. Dratel eds. 2005).
- 31 In particular, federal courts have effectively protected against the disclosure of classified evidence in criminal cases through procedures provided under the Classified Information Procedures Act. Pub. L. No. 96-456, 94 Stat. 2025 (1980), codified at 18 U.S.C. app. 3 sec. 1 *et seq.*
- 32 *See* Serrin Turner & Stephen J. Schulhofer, Brennan Center for Justice, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005), available at http://www.brennancenter.org/dynamic/subpages/download_file_34654.pdf.
- 33 *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).
- 34 *See* Combatant Status Review Tribunals Order of the Deputy Secretary of Defense of July 7, 2004,

para. a, *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

- ³⁵ See *Boumediene v. Bush*, 476 F.3d 981, 1005-07 (D.C. Cir. 2007) (Rogers, J. dissenting); see also Mark Denbeaux and Joshua Denbeaux, NO-HEARING HEARINGS: CSRT THE MODERN HABEAS CORPUS? AN ANALYSIS OF THE PROCEEDINGS OF THE COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO, at 26-33 (2006), *available at* law.shu.edu/news/final_no_hearing_hearings_report.pdf. Instead, the CSRT allows a detainee to present evidence only when “reasonably available,” a provision CSRT has construed to refuse detainees’ requests to call witnesses (including other detainees at Guantanamo) and detainees’ requests to obtain basic documents, such as medical records from a specified hospital, a passport, and records from court proceedings, all of which could have exonerated the detainee.
- ³⁶ See Denbeaux and Denbeaux, *supra* note 35, at 31.
- ³⁷ See *Boumediene v. Bush*, 476 F.3d at 1006; see also, M. Denbeaux, *supra*, at 36.
- ³⁸ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).
- ³⁹ *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari).
- ⁴⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

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