TESTIMONY OF JONATHAN HAFETZ, LITIGATION DIRECTOR, LIBERTY AND NATIONAL SECURITY PROJECT OF THE BRENNAN CENTER FOR JUSTICE, NYU SCHOOL OF LAW

OVERSIGHT HEARING ON HABEAS CORPUS AND DETENTIONS AT GUANTANAMO BAY

BEFORE THE

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

JUNE 26, 2007

Introduction

Thank you Chairman Conyers, Chairman Nadler, Ranking Member Smith, Ranking Member Franks, and all Members of the Subcommittee for inviting me to share my views at today's Oversight Hearing on Habeas Corpus and Detentions at Guantanamo Bay. We are grateful for your leadership, and we have appreciated the opportunity to work with your offices on the effort to restore habeas corpus for detainees at Guantanamo. We also appreciate the Subcommittee's careful and deliberate approach to this issue, which is among the most important of our time.

My name is Jonathan Hafetz, and I am Litigation Director of the Liberty and National Security Project of the Brennan Center for Justice at New York University School of Law ("the Center"). The Center was founded in 1995 as a living tribute to U.S. Supreme Court Associate Justice William J. Brennan, Jr. Combining elements of a think tank, a public interest law firm, a technical assistance provider, and an advocacy organization, the Center works to strengthen our democracy, make our governmental processes transparent and accountable, and to bring human values to the economic and justice systems. The Center's attorneys, scholars, and communications experts engage in ground-breaking impact litigation to challenge anti-democratic policies; produce legal and policy research to measure the economic and social impact of current and proposed policies; and, through strategic public education, reframe the debate on issues of profound importance.

The Center's Liberty and National Security Project ("LNS") seeks to develop the intellectual infrastructure and framework for a national security policy that respects rights and follows constitutional norms. Developing this framework entails a mix of advocacy strategies, innovative policy development, and legal work. It means challenging stale presumptions. It means developing new coalitions of allies among advocacy groups. And, it means deepening, via broad-gauge advocacy, public consensus on the primacy of liberty in security policy.

LNS has focused extensively on preserving habeas corpus in the aftermath of September 11. LNS' recent report, *Ten Things You Should Know About Habeas Corpus*, describes the importance of habeas corpus for Guantanamo detainees and others. LNS is counsel of record in *Al-Marri v. Wright*, the case involving the only individual presently detained in the

mainland United States as an "enemy combatant." LNS has been actively engaged in the Guantanamo detainee litigation, where it has filed several friend of the court briefs on the history and importance of habeas. I have visited Guantanamo several times in connection with my representation of a detainee there.

The subject of today's hearing cuts to the heart of America's values and commitment to the rule of law. Since pre-revolutionary American history, habeas corpus has been a cornerstone of our system, protecting individuals against unlawful exercises of state power. Habeas guarantees individuals seized and detained by the government the right to question the grounds for their detention. It has traditionally been available to citizens, non-citizens, slaves, alleged spies, and alleged enemies alike.

Twice, however, in the past two years, Congress has passed statutes curtailing habeas rights. The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 limit federal court jurisdiction to hear petitions filed by or on behalf of foreign nationals detained as "enemy combatants" at Guantanamo and elsewhere. The Administration has argued that these acts deprive even legal immigrants in the United States of their right to habeas corpus. These restrictions, moreover, are not limited to a time-bound, immediate emergency but are permanent, forever stripping access to the writ for a singled-out class of people.

Most immediately, these acts deprive the approximately 375 prisoners who remain at Guantanamo of their right to file habeas petitions in district court to determine whether or not they are lawfully held. Most of these detainees have been imprisoned at Guantanamo for more than five years without a meaningful opportunity to challenge the factual and legal basis for their confinement. But much more is at stake than the fate of these individuals. America's reputation and commitment to the rule of law hangs in the balance.

As former Secretary of State Colin Powell recently explained, denying habeas corpus to detainees at Guantanamo has "shaken the belief that the world had in America's justice system." The consequences could not be graver, undermining faith not only in America's moral credibility but also in its counter-terrorism efforts as a whole. The first and most important step in regaining that faith is restoring habeas corpus. As Mr. Powell said, "Isn't that what our system is all about?"[1]

My testimony will be divided into five parts. First, it will describe the historical importance of habeas corpus and its centrality to the Constitution. Second, it will provide an overview of the efforts to deny habeas corpus to Guantanamo detainees, despite two Supreme Court decisions highlighting the vital importance of habeas review. Third, it will explain how Guantanamo demonstrates the importance of habeas corpus in providing meaningful review to ensure that the United States is detaining the right people and holding them in accordance with its legal obligations. Fourth, it describes why restoring habeas is essential to regaining the legitimacy and moral credibility necessary to build an effective counter-terrorism policy. Finally, it will detail the flaws in arguments against providing habeas corpus to Guantanamo detainees. In particular, it will explain why what the Administration describes as a "Global War on Terrorism" makes habeas *more*, not less, important.

I. The Paramount Importance Of Habeas Corpus

Habeas corpus traces its roots to 1215 and the signing of the Magna Carta. For centuries, it has provided the most fundamental safeguard against unlawful executive detention in the Anglo-American legal system. Habeas corpus was available in all thirteen British colonies from the time they were established until the American Revolution.[2] Alexander Hamilton declared habeas corpus a "bulwark" of individual liberty, calling secret imprisonment the most "dangerous engine of arbitrary government."[3] At its historical core, the writ provides a check against executive detention without trial, and it is in this context that its protections have traditionally been strongest.[4]

No one at the Constitutional Convention in Philadelphia debated whether to include habeas corpus 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 states:

> 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]

The First Congress codified this constitutional command in the Judiciary Act of 1789,[7] making the writ available to any individual held by the United States who challenges the lawfulness of his detention.

Habeas corpus has been suspended on only the rarest of occasions in American history and amid active and ongoing rebellion or invasion. It was suspended twice during the Civil War, 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.[8] Each time, Congress responded to an ongoing, 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.

Repealing habeas, therefore, is not a casual act. The permanent elimination of habeas corpus departs radically from the course of American history and the intentions of those who wrote the Constitution and established this Nation's laws.

II. The Effort To Deprive Guantanamo Detainees Of Habeas Corpus

A. Establishing A Prison Beyond The Law At Guantanamo

In the months after the September 11 attacks, the Administration charted a course away from a rights-respecting approach to national security policy and towards creating a prison beyond the law at Guantanamo. First, the President unilaterally declared individuals in U.S. custody "enemy combatants" (or "unlawful enemy combatants") in a "Global War on Terror" to deny them any legal protections under the Geneva Conventions while allowing their indefinite detention without charge. Second, the Administration deliberately brought prisoners to Guantanamo to prevent courts from reviewing the lawfulness of their detention. A December 2001 Memorandum by Justice Department attorneys Patrick Philbin and John Yoo, leaked to the press in 2004, reveals this strategy, arguing why federal courts should find that Guantanamo was outside their habeas jurisdiction.

The Memorandum, notably, acknowledged that if federal courts did exercise habeas review, they might invalidate the detentions.[9]

In June 2004, the Supreme Court rebuked the Administration's attempt to deprive Guantanamo detainees of habeas corpus. In *Rasul v. Bush*, the Court ruled that the federal courts had jurisdiction over habeas corpus petitions filed by or on behalf of detainees at Guantanamo.[10] The Court emphasized that "[e]xecutive imprisonment has been considered oppressive and lawless since [Magna Carta]," and that the writ of habeas corpus was developed precisely to protect individuals from such arbitrary exercises of executive power.[11] The Supreme Court also explained that extending habeas rights to non-citizen detainees at Guantanamo – territory under the exclusive and permanent control of the United States – was consistent with the historical purpose and scope of the common law writ.[12] *Rasul* thus established that detainees at Guantanamo had the right to challenge the factual and legal basis for their confinement before a federal judge by way of habeas corpus.

The Administration, however, immediately sought to block the Supreme Court's ruling. Nine days after *Rasul* was decided, the Defense Department created a summary military proceeding known as a Combatant Status Review Tribunal ("CSRT") to avoid habeas review. The order establishing the CSRT pre-judged the detainees, declaring that they had already been found to be "enemy combatants" based upon multiple levels of internal review. Rather than affording the detainees a meaningful opportunity to prove their innocence, the CSRT denied them the most basic protections against erroneous decisions.

The CSRT, for example, denies detainees the assistance of counsel, prohibits them from seeing the government's allegations, and fails to supply a neutral decisionmaker to rule on their cases. Instead of attorneys, detainees are given "Personal Representatives" with whom they typically meet only briefly before their hearing. Personal Representatives, moreover, do not represent the detainees and often advocate against them.[13] The government, moreover, has not produced a single witness in any CSRT hearing, and has routinely denied detainees' requests to call witnesses or to obtain documentary evidence that would conclusively prove their innocence.[14] For example, the CSRT has denied such reasonable requests as contacting a close family member by telephone to verify a detainee's story; locating a detainee's passport to demonstrate his whereabouts; locating

medical records from a specified hospital; and obtaining documents from court proceedings that could have exonerated the detainee.[15] Further, the CSRT permits the use of evidence gained by torture and other coercion[16] – evidence that the Supreme Court has said is not only inherently unreliable, but repugnant to the values of a civilized society.[17] As District Judge Joyce Hens Green found, the CSRT's numerous flaws deny the core protections of due process that habeas provides: a meaningful factual inquiry to determine whether a prisoner is lawfully held.[18]

In addition, the CSRT employs a sweeping and elastic definition of "enemy combatant" that effectively sanctions indefinite detention based upon rumor, innuendo, and mere association. Specifically, the CSRT defines an "enemy combatant" as an "individual who was part of or supporting Taliban or al Qaeda forces or associated forces that engaged in hostilities against the United States or its coalition partners."[19] According to the Administration, this definition encompasses individuals who gave money or support to charities or other organizations that, unbeknownst to them, were engaged in terrorist activity.[20] The concerns raised by this overbroad definition are not hypothetical. Publicly available records indicate that the United States has detained individuals at Guantanamo without any proof that they intended to engage, let alone actually engaged, in any actions harmful to the United States or its allies.[21] According to the Defense Department's own data, only 8% of the Guantanamo detainees are characterized as al Qaeda fighters; 40% have no definitive connection with al Qaeda; and 55% never have committed any hostile act against the United States or its allies.[22] Moreover, many detainees are being held at Guantanamo based upon their alleged affiliation with organizations that neither Congress nor the State Department has identified as terrorist organizations and whose members are permitted to enter the United States under federal immigration law.[23]

A recent affidavit by a military official closely involved in the CSRT process highlights why these hearings are a sham, a deliberate effort to shield executive detention from the meaningful scrutiny habeas affords. Lt. Col. Stephen Abraham, a 26-year-veteran of military intelligence, said officials responsible for compiling the CSRT record were provided only with "generic" material about detainees, and that "[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence." Lt. Col. Abraham also noted that various agencies withheld exculpatory evidence about detainees from the CSRT. Further, Lt. Col. Abraham detailed how problems of command influence

pervaded the CSRT, whose three-member panels were pressured from above to find detainees "enemy combatants."[24]

The CSRT's manifest flaws underscore the importance of habeas corpus in determining whether prisoners at Guantanamo are lawfully detained and in giving the detentions at Guantanamo legitimacy. Yet, Congress has now twice enacted statutes repealing habeas rights for Guantanamo detainees.

B. Congressional Statutes Stripping The Courts Of Habeas Jurisdiction

In December 2005, Congress enacted the Detainee Treatment Act of 2005 ("DTA"), which purported to eliminate jurisdiction over petitions filed by or on behalf of Guantanamo detainees.[25] In place of habeas, the DTA created an alternative mechanism where detainees could seek review of final CSRT decisions directly in the United States Court of Appeals for the District of Columbia Circuit. But, as described below, that mechanism is inherently flawed, serving to shield CSRT findings from meaningful scrutiny.

In June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the DTA's repeal did not apply to pending habeas petitions.[26] At the same time, the Court reinforced the importance of habeas corpus as a check on arbitrary executive power by invalidating the jerry-rigged military commissions established by the President to try the handful of Guantanamo detainees who have been charged with crimes[27] and by affirming that all detainees are protected, at a minimum, by Common Article 3 of the Geneva Conventions which requires basic protections for military trials and prohibits torture, cruel treatment, and other abuse.[28]

Congress responded by enacting the Military Commissions Act of 2006 ("MCA")[29] which not only sought to resurrect the flawed system of military commissions but also stripped all Guantanamo detainees of habeas rights. Moreover, this time the court-stripping legislation was not limited to Guantanamo but extended to other foreign nationals detained as "enemy combatants." The Administration has argued that the MCA repeals habeas corpus even for lawful resident aliens in the United States.[30] Under the government's interpretation of the MCA, the President could effectively disappear immigrants in the United States and imprison them indefinitely without judicial review simply by labeling them "enemy combatants."

In February 2007, the United States Court of Appeals for the District of Columbia Circuit upheld the MCA's repeal of habeas jurisdiction for Guantanamo detainees. In a divided decision, the court ruled in *Boumediene v. Bush* that Guantanamo detainees had no constitutional right to habeas corpus because they were foreign nationals captured and detained outside the United States.[31] The Supreme Court denied certiorari.[32] In doing so, however, the Supreme Court did not indicate agreement with the lower court opinion that the Guantanamo detainees lacked a constitutionally protected right to habeas corpus. On the contrary, three Justices dissented from the denial,[33] and two other Justices issued a separate statement indicating that Guantanamo detainees should first exhaust available remedies under the DTA.[34]

Litigation under the DTA is now pending in the District of Columbia Circuit, and will initially address threshold questions of counsel access and discovery under this review mechanism. It is possible that litigation will again reach the Supreme Court. But Congress should not wait for what will no doubt be more protracted court battles. Several bills reestablishing habeas corpus for Guantanamo detainees have been introduced into Congress. Lawmakers should act now to return habeas to its rightful, historic, and fundamental place in American law by restoring the writ to its post-2004 statutory *status quo*.

III. The Importance Of Habeas Corpus For Guantanamo Detentions

The importance of habeas corpus for Guantanamo detainees cannot be gainsaid. As described below, habeas affords detainees meaningful review of the legal and factual basis for their detentions. This review is particularly important for Guantanamo detainees because of the Administration's failure to distinguish between innocent civilians and combatants; the United States' reliance on non-U.S. forces in the capture of nearly all Guantanamo detainees, many of whom were turned over to the United States on the say-so of bounty hunters eager for a promised reward; the United States' decision to seize people far from any recognizable battlefield; the use of torture and other abuse to manufacture evidence to justify detentions; and the pervasive political pressure from above to rubber-stamp detainees "enemy combatants." Habeas also provides other protections, including access to counsel, release for those improperly held, and review of prisoner

transfers to prevent a detainee's illegal rendition to a country where he will face torture.

A. Review Of The Legal And Factual Basis For A Prisoner's Detention

The essence of habeas corpus is meaningful judicial review of the legal and factual basis for a prisoner's confinement. This protection is essential for Guantanamo detainees who have been detained by the executive for years without charge and without lawful process.

In *Hamdi v. Rumsfeld*, the Supreme Court held that the President could detain as an "enemy combatant" an individual who was captured in Afghanistan where he had directly engaged in armed conflict against the United States or allied forces.[35] The Court explained that Hamdi's detention was consistent with longstanding law-of-war principles and Congress' Authorization for Use of Military Force passed after September 11.[36] As described above, the Administration has since defined "enemy combatant" in sweeping terms far exceeding the definition upheld in *Hamdi* and what the Constitution and laws of war allow. The United States Court of Appeals for the Fourth Circuit recently rejected the President's sweeping definition of "enemy combatant" as applied to a lawful resident alien arrested in the United States, demonstrating the vital check habeas provides against illegal executive action.[37] Habeas review, in short, is critical in helping ensure that the definition of "enemy combatant" remains, as the Supreme Court said, within "the permissible bounds" of the law.[38]

Habeas also guarantees review of the factual basis for a prisoner's confinement in cases of executive detention.[39] That is, even where the legal limits of the "enemy combatant" category have been properly defined, habeas helps ensure that a particular detainee actually falls within that category. Thus, in *Hamdi*, the Supreme Court instructed the district court to determine whether there was a sufficient factual basis for concluding that the petitioner had actually participated in hostilities against the United States in Afghanistan. By providing a detainee with notice of the allegations against him and a meaningful opportunity to be heard before a neutral decisionmaker (including a fair chance to rebut the government's evidence), habeas helps prevent errant tourists, embedded journalists, local aid workers, and others from being imprisoned by mistake.[40]

Habeas review is crucial for detainees at Guantanamo who have never been afforded a meaningful process to assess whether the government's allegations are accurate. During the conflict in Afghanistan, the United States failed to conduct the battlefield hearings that are required by the Third Geneva Convention[41] and pre-existing U.S. army regulations[42] to separate innocent civilians from actual combatants. These hearings (known as "190-8 hearings") are conducted close in time and place to a prisoner's capture to ensure accuracy, and are important in preventing mistaken detention. During the Gulf War, for example, the military held 1,196 Article 190-8 hearings and in 886 of those cases, the detainees were found to be innocent civilians, not combatants, and were released.[43] The circumstances in Afghanistan after September 11 made these hearings especially important. According to Defense Department documents, only 5% of the detainees at Guantanamo were captured by U.S. forces; 86% were taken into custody by Pakistani or Afghan forces at a time when the U.S. was offering large financial bounties for the capture of any terrorist.[44] While military officers urged that these hearings be conducted, they were overruled by civilian officials in Washington.[45]

It became apparent early on that most Guantanamo detainees were not the hard-core terrorists the Administration insisted they were.[46] A confidential report sent by the CIA to Washington in October 2002 – and ignored by the Administration – stated that most of the Guantanamo detainees "didn't belong there."[47] 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."[48]

Habeas corpus provides that muscle. It does not, by itself, require any prisoner's release. What it does do, however, is afford the meaningful factual review that Guantanamo detainees have been denied now for more than five years. This review is essential to determining whether the Administration is detaining the right people and is holding them in accordance with the law.

At the same time, habeas hearings are not full-blown criminal trials where the government must prove guilt beyond a reasonable doubt. Rather, they are expedited proceedings where the government must show only that there is a sufficient legal and factual basis for a prisoner's detention. If the government can demonstrate such a basis, a court will uphold the prisoner's

detention. Habeas cases will neither clog the courts nor coddle terrorists. They will simply give individuals who are wrongfully imprisoned a meaningful chance to prove their innocence and to show their detention is illegal.

B. Access To Counsel

Federal courts have uniformly concluded that habeas petitioners have a right to counsel in connection with their legal challenges. As one district judge explained, counsel access is necessary to ensure the "careful consideration and plenary processing" of detainees' claims that habeas corpus requires.[49]

Counsel access has increased openness and accountability at Guantanamo. Before the Supreme Court's decision in *Rasul*, no detainee had met with or spoken to an attorney even though they had been imprisoned for more than two years. Information about Guantanamo was based on official government descriptions. However, when attorneys started meeting with detainees after *Rasul*, an alternative account emerged about who was detained at Guantanamo and how they were being treated. It became apparent that the Guantanamo detainees were not "the worst of the worst" and that they were being held in often brutal conditions and subjected to torture and other coercive interrogation techniques. Counsel access helped focus attention on problems at Guantanamo and provided an important check on the abuse of government power.

Not surprisingly, the government has seized on the repeal of habeas corpus jurisdiction to significantly curtail attorney access. While the government has abandoned its initial proposal to limit the number of visits by attorneys, it is still trying to impose draconian restrictions on attorney access. For example, the government has sought to restrict and censor attorney-client mail, to limit attorneys' access to classified information (even though attorneys have the required security clearances), and to eliminate attorney access altogether on its say-so. Notably, the government did not seek to curtail counsel access in any of these ways while the courts exercised habeas jurisdiction under *Rasul*. If adopted, the government's proposed restrictions would eviscerate meaningful access to counsel for Guantanamo detainees, chilling communications between lawyers and their clients, suppressing information about detentions, and inhibiting detainees from meaningfully contesting the allegations against them.

C. *Review Of Transfers To Prevent Illegal Detention And Torture*

Another important function of habeas corpus is to review the lawfulness of a prisoner's transfer from custody. This review serves an important function at Guantanamo, where the President claims unfettered authority to hand detainees to foreign governments despite a significant risk that some detainees may be illegally detained or tortured upon their arrival.

Since the Supreme Court's decision in *Rasul*, many district courts have entered orders preventing a detainee's transfer from Guantanamo without advance notice to his counsel and to the court.[50] A number of these orders were entered against the backdrop of news accounts of a possible mass transfer of Guantanamo detainees to foreign prisons and revelations about the Administration's "extraordinary rendition" program in which individuals are handed over to foreign governments for torture.[51] These advance notice orders do not block any transfer. Instead, they merely provide some protection against renditions in the dead of the night to jails in Egypt, Syria, and other countries that routinely abuse prisoners by giving judges the opportunity to review a transfer to ensure that it complies with the law. A judge, for example, can assess whether a prisoner's proposed transfer violates the United States obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which categorically prohibits transfers where there is a substantial risk of torture.[52]

Congress' repeal of habeas corpus jurisdiction for Guantanamo detainees has jeopardized these protections. The government is currently seeking to vacate advance notice orders entered in existing habeas cases. The courts, meanwhile, have ruled that they lack jurisdiction under the DTA to review the lawfulness of prisoner transfers. Unless habeas is restored, this important safeguard against illegal renditions will be eliminated. The dangers would be exacerbated if Guantanamo were closed and prisoners outsourced to foreign prisons, such as the new prison in Afghanistan that the United States is helping to construct, without any opportunity to contest the lawfulness of their transfer or whether they were properly detained in the first place.

D. Habeas And The Right To Release

Habeas corpus jurisdiction provides an additional check on illegal detentions at Guantanamo by guaranteeing an effective remedy: release. Long ago, William Blackstone described the writ as "the great and efficacious writ in all manner of illegal confinement."[53] The Supreme Court has similarly explained that the writ's importance as a safeguard against unlawful and arbitrary executive action lies in a judge's power and ability to grant an effective remedy.[54] The federal habeas statute thus gives judges broad power to do as "law and justice require," including to order a prisoner's release where his detention is illegal.[55]

Repealing habeas corpus undermines this core protection and allows the Administration to continue holding prisoners even when there is no longer any basis to do so. Notably, the Administration has detained prisoners at Guantanamo for months even *after* concluding they are not properly detained as enemy combatants. Eliminating habeas deprives such prisoners of an effective remedy and makes their release a matter of executive discretion and grace.

IV. Habeas Is Essential To America's Legitimacy And Moral Credibility.

Habeas corpus is about more than providing a lawful process to those whom America detains. It is also central to America's effort to give legitimacy to its counter-terrorism policy. It is precisely the absence of this legitimacy that has made Guantanamo a lightening rod for criticism and tarnished America's moral credibility.

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

> Are we capturing, killing or deterring and dissuading more terrorists every day than the madras's and the radical clerics are recruiting, training and deploying against us?[56]

The sense that the United States is a country that honors the rule of law and basic human rights has long been our core foreign-policy asset. 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."[57] 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.[58] (Gates has urged that the Guantanamo facility simply be closed.) Disregarding longstanding constitutional protections simply offers new ammunition to those who assert that the United States is a lawless hyper power.

The creation of whole classes of people who can be held without review or any guarantee of fundamental rights undermines the United States' 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.

V. The False Arguments Against Habeas

Supporters of DTA and MCA make several arguments why Congress should not guarantee habeas corpus for Guantanamo detainees. They argue, for example, that foreign nationals have traditionally not had habeas rights during wartime, that Guantanamo detainee habeas petitions are largely frivolous, and that, in any event, Congress has created an adequate and effective substitute for habeas under the DTA. Those arguments are misguided. They misunderstand both the nature of habeas and the vital role it plays at Guantanamo.

A. Foreign Nationals Have Habeas Rights Even During Wartime

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 those cases, *In re Yamashita*[59] and *Ex parte Quirin*,[60] ultimately rejected the petitioners' claims, habeas review was nonetheless used 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 a World War II case, *Johnson v. Eisentrager.*[61] 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" at Guantanamo is very different. An overwhelming majority of prisoners there deny that 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.[62] 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 – a territory that, in the words of Supreme Court Justice Anthony M. Kennedy, "is in every practical respect a United States territory."[63] For those detainees who seek to contest their designation as "enemy combatants," the United States is the only sovereign that can hear their cases and order them freed if they are wrongly detained.

Further, Guantanamo detainees are being held in what the Administration describes as a "Global War on Terrorism," which distinguishes them in important ways from prisoners in prior conflicts.[64] Previously, the United States fought wars against enemy nations where soldiers and battlefields were easily recognizable. But in the so-called "Global War on Terrorism," there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. The nature of the conflict, therefore, increases the risk that we will inadvertently detain innocent civilians based upon suspicion, innuendo, or mistake. Moreover, because this "war" could last for generations, the consequences of such wrongful detentions are particularly severe. Habeas corpus thus plays a different and more important role now than in prior conflicts to ensure that innocent people are not wrongfully imprisoned and that the President does not exceed legal limits on his detention power.

B. Habeas Petitions Are Not Frivolous Prisoner Conditions Suits

As Congress debated the DTA and MCA, many legislators appeared to believe that Guantanamo detainees were routinely using habeas petitions

to file frivolous complaints about prison food or insufficient Internet access. "Crazy lawsuits out there." That is what Senator Lindsey Graham said about lawsuits in which Guantanamo detainees complained about slow mail service and the quality of medical services.[65]

In fact, the Guantanamo detainee 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 petitions 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 forced feedings and other improper practices.[66] In so doing, they are simply ensuring that they can zealously represent a client whose wishes they can discern. And this small number of cases may be indicative more of abusive interrogation and other problematic practices rather than of any danger that the habeas right will be abused for frivolous purposes.

C. Congress Has Not Created An Adequate Substitute for Habeas

The Military Commissions and Detainee Treatment Acts do not provide adequate substitutes for habeas corpus. Quite the reverse: these laws sanction indefinite imprisonment without due process and eviscerate the core protections that habeas provides.

Under these new statutes, Guantanamo detainees can seek review of final CSRT decisions in the United States Court of Appeals for the District of Columbia Circuit. But both statutes limit the scope of that review in crucial ways. These laws confine judicial review to the record of the facts created by the CSRT. As described above, the CRST lacks key protections against erroneous decisions and is subject to pervasive command influence. It simply does not – and cannot – serve as a fair fact-finding instrument. Any detention review scheme that is grounded on acceptance of CSRT findings will necessarily be flawed.

As written, the MCA and DTA also do not allow CSRT records to be supplemented even if available evidence conclusively proves the detainee's innocence or shows that he confessed after prolonged abuse and/or torture. Court review limited in these fundamental ways undermines the integrity of the Judiciary by denying appeals 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. As noted above, the District of Columbia Circuit recently ruled that the MCA eliminates jurisdiction over the Guantanamo detainee habeas cases.[67] The Supreme Court decided not to review this decision. In so doing, the Court indicated that prisoners at Guantanamo should first go back to the District of Columbia Circuit.[68] But that court has already ruled that the detainees have no constitutional rights, so the exhaustion of the DTA and MCA's limited remedies will almost certainly be futile. The Supreme Court may review the District of Columbia Circuit's decision, but Congress does not need to – and should not – wait for the courts 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 DTA and MCA enable other questionable government conduct, including the unchecked and unreviewable transfer of Guantanamo detainees to face torture by foreign governments. Unlike habeas, the MCA and DTA do not provide for, and in fact expressly bar, judicial review of a detainee's transfer to a foreign government. They thus gut the important role habeas plays in helping enforce the United States' domestic and international legal obligations against rendering prisoners for torture.

Further, unlike habeas, the MCA and DTA do not affirmatively empower a court to release a detainee if wrongfully held. The government, moreover, has taken the position that the District of Columbia Circuit lacks that power under the DTA. Absent habeas, detainees with meritorious claims will likely confront a potentially endless cycle of remands to the CSRT rather than the promise of release from illegal detention that habeas provides.

Conclusion

For centuries, habeas corpus has provided the greatest protection against illegal and arbitrary executive detention in our system. The failure to ensure this protection at Guantanamo has led to the prolonged imprisonment of innocent people, facilitated abuses of executive power, and tarnished America's moral credibility.

Several legislators have proposed closing Guantanamo as a solution. Certainly, that is a step in the right direction, a recognition that off-shore penal colonies do not make America safer or more free. But closing Guantanamo should not be a substitute for restoring habeas corpus. Simply moving Guantanamo detainees to Fort Leavenworth or other prisons in the United States would not address the root of the problem – the absence of a lawful and legitimate process to determine whether a prisoner is being illegally detained in the first place. In addition, closure without habeas restoration would do nothing to prevent the United States from establishing more Guantanamos in the future. The underlying problem is the attempt to create a prison beyond the law, not the location of that prison. If Congress is serious about addressing that problem, it must restore habeas corpus as a necessary first step in creating a rights-respecting national security policy.

Thank you.

---

[1] Meet the Press, NBC television broadcast, June 10, 2007, *available at* http://www.msnbc.msn.com/id/19092206/.

[2] William F. Duker, *A Constitutional History of Habeas Corpus* 98, 115 (1980).

[3] *The Federalist* No. 84 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[4] *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *Swain v. Pressley*, 430 U.S. 372, 385-86 (1977) (Burger, C.J., concurring); *Brown v. Allen*, 344 U.S. 443, 533 (Jackson, J., concurring in result).

[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] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified at 28 U.S.C. § 2241(c)(1)).

[8] William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980).

[9] 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).

[10] 542 U.S. 466 (2004).

[11] *Id.* at 474.
[12] *Id.* at 481-82.
[13] Mark Denbeaux et al., *No Hearing Hearings: CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo* 16 (2007), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.
[14] *Id.* at 22, 36.
[15] *Id.* at 32-33.
[16] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472 (D.D.C. 2005); Oral Argument Transcript, Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL) (D.D.C.); *Boumediene v. Bush*, 04-CV-1166 (RJL) (D.D.C.), at 84:7-84:22.
[17] *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 173 (1952); *Spano v. New York*, 360 U.S. 315, 320 (1959).
[18] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-74 (D.D.C. 2005).
[19] *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. This category includes, but is not limited to, "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.*
[20] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).
[21] *See* Mark Denbeaux et al., *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, *available at* http://law.shu.edu/aaafinal.pdf.
[22] *Id.*
[23] Mark Denbeaux et al, *Second Report on Guantanamo Detainees: Inter- and Intra-Departmental Disagreements About Who Is Our Enemy* (2006), *available at* http://law.shu.edu/news/second_report_guantanamo_detainees_3_20_final.pdf.
[24] Declaration of Stephen Abraham, Lt. Col., U.S. Army Reserve, June 15, 2007.
[25] Pub. L. No. 109-148, 119 Stat. 2680 (2005).
[26] __ U.S.__, 126 S. Ct. 2749, 2764-65 (2006).
[27] *Id.* at 2797-98
[28] *Id.* at 2795.
[29] Pub. L. No. 109-366, 120 Stat. 2600 (2006).
[30] Although United States Court of Appeals for the Fourth Circuit recently rejected that argument, the government has announced it will appeal that decision. *See Al-Marri v. Wright*, __ F.3d __, 2007 WL 1663712, at *10 (4th Cir. June 11, 2007).
[31] 476 F.3d 981 (D.C. Cir. 2007). Judge Judith Rogers dissented, finding that the Guantanamo detainees had a constitutional right to habeas corpus. *Boumediene*, 476 F.3d at 994-95 (Rogers J., dissenting).
[32] __ U.S. __, 127 S. Ct. 1478 (2007).
[33] *Id.* at 1479 (Breyer, J., joined by Ginsburg & Souter, JJ., dissenting).
[34] *Id.* at 1478 (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari).
[35] 542 U.S. 507, 516 (2004) (plurality opinion).
[36] *Id.* at 521; *id.* at 549 (opinion of Souter, J.).
[37] *Al-Marri v. Wright*, __ F.3d __, 2007 WL 1663712, at *10 (4th Cir. June 11, 2007).
[38] *Hamdi*, 542 U.S. at 522 n.22 (plurality opinion).

[39] *Boumediene*, 476 F.3d at 1005(Rogers, J., dissenting); Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 Cardozo Public Law, Policy, and Ethics Journal 127, 152-58 (2006).

[40] *Hamdi*, 542 U.S. at 534.

[41] Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287.

[42] *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, Army Regulation 190-8, (1997), *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf.

[43] Report on the Conduct of the Persian Gulf War, Final Report to Congress by the Department of Defense (April 1992).

[44] Denbeaux et al., *Report on the Guantánamo Detainees, supra*, at 2-4; Carol D. Leonnig & Julie Tate, *Guantánamo: Five Years Later*, Wash. Post, Jan. 17, 2007. Indeed, Defense Secretary Rumsfeld proclaimed that leaflets advertising this money-for-capture program fell over Afghanistan "like snowflakes in December in Chicago." *See U.S. Hopes $25 million reward will lead to bin Laden*, Associated Press, Nov. 20, 2001.

[45] *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, The New Yorker, July 3, 2006.

[46] Defense Secretary Rumsfeld and other Administration officials also repeatedly referred to the Guantánamo detainees as "the worst of the worst," and claimed that they included many senior al Qaeda operatives who had been involved in active plots against Americans. *See* Neil A. Lewis & Eric Schmitt, *Guantánamo Prisoners Could Be Held For Years, U.S. Officials Say*, N.Y. Times, Feb. 13, 2004.

[47] Mayer, *The Hidden Power*, *supra*.

[48] Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, Wall St. J, Jan. 26, 2005, at A1.

[49] *See, e.g.*, *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004).

[50] *See* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 667 (2004) (summarizing decisions).

[51] Douglas Jehl, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at A1; Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, Wash. Post, Mar. 11, 2002.

[52] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[53] William Blackstone, 3 *Commentaries* *131.

[54] *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 319 (1995); *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

[55] 28 U.S.C. § 2243.

[56] Walter Shapiro, *Rumsfeld Memo Offers Honest Display of Doubts About War*, USA Today, Oct. 24, 2003, at 5A.

[57] David Jackson & Kathy Kiely, *Strategy on Terror Suspects Splits GOP; Key Senators Say No to Bush Plan*, USA Today, Sep. 15, 2006, at 1A.

[58] Thom Shanker & David Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. Times, Mar. 23, 2007, at A1.

[59] *In re Yamashita*, 327 U.S. 1 (1946).
[60] *Ex parte Quirin*, 317 U.S. 1 (1942).
[61] *Johnson v. Eisentrager,* 339 U.S. 763 (1950).
[62] 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.
[63] *Rasul v. Bush*, 542 U.S. 466, 487 (2004).
[64] The Brennan Center rejects the proposition that there is such a thing as a "Global War on Terror" or that United States can be at war with an international terrorist organization like al Qaeda under principles of international humanitarian law or the U.S. Constitution. However, even accepting *arguendo* the Administration's terms, habeas corpus must exist to ensure that this "war" is conducted within legal limits and that individuals are not wrongfully detained.
[65] National Defense Authorization Act for Fiscal Year 2006 - Conference Report, 151 Cong. Rec. S14256, 14262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham).
[66] *See, e.g.,* Tim Golden, *Guantanamo Detainees Stage Hunger Strike Despite Force-Feeding Policy*, N.Y. Times, Apr. 9, 2007, at A12.
[67] *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).
[68] *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (statement of Stevens and Kennedy, JJ., respecting the denial of certiorari).