



STATEMENT ON RESTORING *HABEAS CORPUS*
RIGHTS ELIMINATED BY THE MILITARY
COMMISSIONS ACT

Statement of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances

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STATEMENT ON RESTORING *HABEAS CORPUS* RIGHTS ELIMINATED BY THE MILITARY COMMISSIONS ACT*

We, the undersigned members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances, are deeply troubled by the recent legislation eliminating *habeas corpus* for certain non-citizens detained by the United States. We recommend that Congress vote to restore federal court jurisdiction to hear these *habeas corpus* petitions.

Habeas corpus has for centuries served as the preeminent safeguard of individual liberty and the separation of powers by providing meaningful judicial review of executive action. In 2004, the United States Supreme Court upheld the right of Guantanamo detainees to file *habeas corpus* petitions to challenge the lawfulness of their indefinite detentions.

Nevertheless, in October 2006, Congress enacted the Military Commissions Act ("MCA") eliminating *habeas corpus* for certain aliens held by the United States as "enemy combatants." While we recognize the need to detain foreign terrorists to protect national security, we do not believe repealing federal court jurisdiction over *habeas corpus* serves that goal. On the contrary, *habeas corpus* is crucial to ensure that the government's detention power is exercised wisely, lawfully, and consistently with American values.

The protections of *habeas corpus* have always been most critical in cases of executive detention without charge. In these circumstances, *habeas corpus* proceedings afford prisoners a meaningful opportunity to be heard before a neutral decisionmaker.

The unconventional nature of the current "war on terrorism" makes *habeas corpus* more, not less, important. Unlike in traditional conflicts, there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. The administration claims the power to imprison individuals without charge indefinitely, potentially forever. For that reason, it is essential that there be a meaningful process to prevent the United States from detaining people without legal

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authority or mistakenly depriving innocent people of their liberty. *Habeas corpus* provides that process.

Habeas corpus is particularly important because of the way in which many detainees at Guantanamo came into U.S. custody. Most detainees were captured far from an active battlefield; many were sold for bounty by Afghani warlords to the Northern Alliance before being handed over to American forces. And, unlike in previous conflicts, the U.S. military did not provide a prompt hearing to determine a detainee's status, as the Geneva Conventions and U.S. army regulations require. As the Supreme Court has made clear, in the absence of such process *habeas corpus* is necessary to ensure that legal and factual errors are corrected and detention decisions are viewed as legitimate.

We recognize that the Military Commissions Act and the Detainee Treatment Act of 2005 provide detainees at Guantanamo with hearings before a Combatant Status Review Tribunal ("CSRT"), and that the CSRT decisions may be reviewed by the United States Court of Appeals for the D.C. Circuit. But we believe that this review scheme cannot replace *habeas corpus* for two principal reasons.

First, the CSRT process lacks the basic hallmarks of due process. Among other problems, it relies on secret evidence, denies detainees the chance to present evidence in their favor, and prohibits the assistance of counsel. In addition, the process permits the tribunal to rely on evidence obtained by coercion. Second, the D.C. Circuit's review is limited to what will inevitably be an inherently flawed record created by the CSRT. Unlike a U.S. district court judge hearing a *habeas corpus* petition, the D.C. Circuit cannot consider evidence or make its own findings of fact, and, therefore, it cannot rectify the CSRT's inherent procedural flaws.

The result does not provide these prisoners the process which they are due. The government has detained prisoners for more than five years without a meaningful opportunity to be heard, and has failed to create an adequate substitute for *habeas corpus*.

Restoring *habeas corpus* is also important to protecting Americans overseas. The United

States cannot expect other nations to afford our citizens the basic guarantees provided by *habeas corpus* unless we provide those guarantees to others.

If the United States is going to establish a system of indefinite detention without charge, it must at least ensure there is a meaningful process to determine it is holding the right people. When no such process has been provided, as in the case of Guantanamo detainees, *habeas corpus* supplies the critical fail-safe procedure to ensure that the executive has complied with the Constitution and laws of the United States. We also believe that in our constitutional system of checks and balances, it is unwise for the legislative branch to limit an established and traditional avenue of judicial review.

America's detention policy has undermined its reputation in the international community and weakened support for the fight against terrorism, particularly in the Arab world. Restoring *habeas corpus* would help repair the damage and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy. Therefore, we urge Congress to restore the *habeas corpus* rights that were eliminated by the Military Commissions Act.

**Members of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances**
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