



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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The Constitution Project
1025 Vermont Avenue, NW
Third Floor
Washington, DC 20005

202-580-6920 (phone)
202-580-6929 (fax)

info@constitutionproject.org
www.constitutionproject.org

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**
Endorsing the Statement on Restoring *Habeas Corpus* Rights
Eliminated by the Military Commissions Act*

Floyd Abrams, Partner, Cahill Gordon & Reindel LLP

Azizah al-Hibri, Professor, The T.C. Williams School of Law, University of Richmond;
President, Karamah: Muslim Women Lawyers for Human Rights

Bob Barr, Former Member of Congress (R-GA); CEO, Liberty Strategies, LLC; the 21st Century
Liberties Chair for Freedom and Privacy at the American Conservative Union; Chairman of
Patriots to Restore Checks and Balances; practicing attorney

David Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar,
Woodrow Wilson International Center for Scholars; US Ambassador to the UN for UN
Management and Reform, 1994-96

Christopher Bryant, Professor of Law, University of Cincinnati; Assistant to the Senate Legal
Counsel, 1997-99

David Cole, Professor, Georgetown University Law Center

Phillip J. Cooper, Professor, Mark O. Hatfield School of Government, Portland State University

John J. Curtin, Jr., Bingham McCutchen LLP; former President, American Bar Association

John W. Dean, Counsel to President Richard Nixon

Mickey Edwards, Lecturer at the Woodrow Wilson School of Public and International Affairs,
Princeton University; former Member of Congress (R-OK) and Chairman of the House
Republican Policy Committee

Richard Epstein, James Parker Hall Distinguished Service Professor of Law, The University of
Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution

Bruce Fein, Constitutional Lawyer and International Consultant at Bruce Fein & Associates and

The Lichfield Group; Associate Deputy Attorney General, Reagan administration

Eugene R. Fidell, President, National Institute of Military Justice; Partner, Feldesman Tucker Leifer Fidell LLP

Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress

Melvin A. Goodman, Senior Fellow, Director of the National Security Project, Center for International Policy

Morton H. Halperin, Director of U.S. Advocacy, Open Society Institute; Senior Vice President, Center for American Progress; Director of the Policy Planning Staff, Department of State, Clinton Administration

Philip Heymann, James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, Clinton Administration

Robert E. Hunter, U.S. Ambassador to NATO, 1993-98

David Kay, Former Head of the Iraq Survey Group and Special Adviser on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

David Keene, Chairman, American Conservative Union

Christopher S. Kelley, Visiting Assistant Professor of Political Science, Miami University (OH)

Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001

David Lawrence, Jr., President, Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

Thomas Mann, Senior Fellow and W. Averell Harriman Chair, Governance Studies Program, the Brookings Institution

Joseph Margulies, Deputy Director, MacArthur Justice Center; Associate Clinical Professor, Northwestern University School of Law

Alberto Mora, Former General Counsel, Department of the Navy

Norman Ornstein, Resident Scholar, the American Enterprise Institute

Thomas R. Pickering, Undersecretary of State for Political Affairs 1997-2000; United States Ambassador and Representative to the United Nations, 1989-1992

Jack Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

Peter Raven-Hansen, Professor, Glen Earl Weston Research Professor, George Washington Law School

L. Michael Seidman, Professor, Georgetown University Law Center

William S. Sessions, Former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

Jerome J. Shestack, Partner, Wolf, Block, Schorr and Solis-Cohen LLP; former President, American Bar Association

John Shore, Founder and President, noborg LLC; former Senior Advisor for Science and Technology to Senator Patrick Leahy

Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

Suzanne E. Spaulding, Principal, Bingham Consulting Group; former Chief Counsel for Senate and House Intelligence Committees; former Executive Director of National Terrorism Commission; former Assistant General Counsel of CIA

Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, the University of Chicago

Jane Stromseth, Professor, Georgetown University Law Center

William H. Taft, IV, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson; former Legal Advisor, Department of State, George W. Bush Administration; Deputy Secretary of Defense, Reagan Administration

John Terzano, Vice President, Veterans for America

James A. Thurber, Director and Distinguished Professor, Center for Congressional and Presidential Studies, American University

Charles Tiefer, General Counsel (Acting), 1993-94, Solicitor and Deputy General Counsel, 1984-95, U.S. House of Representatives

Patricia Wald, Former Chief Judge, U.S. Court of Appeals for D.C. Circuit

Don Wallace, Jr., Professor, Georgetown University Law Center; Chairman, International Law Institute, Washington, DC

John W. Whitehead, President, the Rutherford Institute

Lawrence B. Wilkerson, Col, USA (Ret), Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell

Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of U. S. Community Relations Service, Johnson Administration

**Affiliations Listed for Identification Purposes Only*