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DEFENDING HUMAN RIGHTS IN THE “WAR” AGAINST TERROR

*Douglass Cassel**

Safeguarding human rights in our “war” against terrorism is both the right and the smart thing to do.

It is right because human rights embody our fundamental values as Americans and as Christians. Our Constitution stands for freedom; our Creator teaches us to respect the God-given dignity of each human soul. Christians are called to cherish human dignity, not only of innocents, and not only of captives in war whose status as combatant or civilian may be uncertain, but also of cardinal sinners, the terrorists themselves. Christ Jesus teaches us to hate the sin, but somehow to bring ourselves to love the sinner. Living up to this counter-intuitive teaching is not easy for mere mortals.

Fortunately, even if we may find it difficult to love terrorists in our hearts, experience teaches that respecting their human rights in our practice is the smart thing to do. Experience teaches that what little advantage we gain from brutality and lawlessness is not worth losing the moral high ground that alienates friend, foe, and neutral bystander alike.

The moral high ground is a front that matters in the “war” against terrorism. Al-Qaeda’s main targets are not buildings and bodies, but hearts and minds. They toppled the World Trade Center and murdered three thousand people,¹ not to put Wall Street out of business, but to send a message to millions worldwide. 9/11 had the effect of terrorizing some populations while rousing an indignant spirit in others.

To win this “war,” we must be at least as smart as our foes. The terrain we must seek to conquer is not mainly on the ground, but in the human mind. When Americans humiliate Iraqi prisoners at Abu

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¹ Bob Minzesheimer, *Even Fiction Can’t Escape 9-11’s Shadow*, USA TODAY, June 6, 2002, at 1D (Life).

Ghraib, they not only commit crimes, they also hand the terrorists a propaganda victory of immense proportion.² We must be smarter. We must understand that only by showing a determined respect for human rights can we convince the world to stand with us. Moreover, by so doing, we will confirm that we see the soul of every child of God, friend or foe, as no less sacred than our own.

I. HUMAN RIGHTS AND THE RULE OF LAW

Properly understood, many disputes over human rights in the “war” against terrorism are not only about the rights of prisoners, but also about maintaining the rule of law that protects us all from tyranny. Americans have more to lose than the terrorists do if we allow the rule of law to unravel.

Our nation’s founders understood that law must restrain power. From their study of the history of ancient Greece and Rome, and of modern Britain and continental Europe, they instinctively embraced the contemporaneous dictum of Lord Acton that “[p]ower tends to corrupt and absolute power corrupts absolutely.”³

In drafting our Constitution and establishing our system of laws, the framers erected a series of legal and institutional bulwarks to curb the inevitable tendency of the executive—especially in stressful times—toward excess. Today these safeguards seem so obvious that Americans take them for granted. However, they were not easily won and, as we are now witnessing once again, they are not easily kept.

In brief, the founders designed the following to safeguard our human rights:

- **Constitutionalism.** Our government and our President have only the power conferred by an agreed, binding charter.⁴

² G. Robert Hillman, *Hussein in Briefs Riles Arabs, Tabloid Photo Angers Many Still Repulsed by Abu Ghraib*, DALLAS MORNING NEWS, May 21, 2005, at 1A (News).

³ Letter from Lord John Acton to Mandell Creighton (Apr. 5, 1887), in 2 SELECTED WRITINGS OF LORD ACTON: ESSAYS IN THE STUDY AND WRITING OF HISTORY, at 383 (J. Rufus Fears ed., 1985).

⁴ See U.S. CONST. art. I § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States”); U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish”).

- **Rule of Law**. No one, not even the Commander in Chief, is above the law. Nor is anyone, not even the lowliest prisoner, beneath the protection of the law.⁵
- **Separation of Powers and Checks and Balances**. The power conferred on public institutions by the Constitution is divided in such a way that the executive, legislative and judicial branches can each keep watch over and rein in each other.⁶
- **Bill of Rights**. Among other rights recognized for all, no “person” (whether or not a citizen) may be “deprived of life, liberty or property without due process of law.”⁷
- **Independent Judiciary**. Federal judges are guaranteed independence through a combination of life tenure, immunity from prosecution for judicial acts, a prohibition of salary cuts, and an ethical ban on external interference.⁸
- **Judicial Review of Constitutionality**. The courts are empowered to review the constitutionality of laws passed by Congress and actions taken by the executive. The Supreme Court has the final say; the other branches must obey its authoritative interpretation, unless and until the Constitution is amended.⁹
- **Habeas Corpus**. Except for battlefield exigencies, anyone deprived of liberty is entitled to have his case brought promptly before a judge to determine whether the imprisonment is lawful and the treatment humane. Habeas corpus may be suspended only in cases of rebellion or invasion, and then only by Congress, not by the executive.¹⁰
- **International Law**. Echoing the “decent respect for the opinions of mankind” given voice in the Declaration of Independence,¹¹

⁵ See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867) (discussing how no one, including the President, is above the law).

⁶ See generally U.S. CONST. art. I, § 3 (granting the power of all impeachments, including the President’s, to Congress); U.S. CONST. art. II, § 2 (granting the President the power to appoint judges for the Supreme Court); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (granting the courts judicial review of all laws).

⁷ U.S.CONST. amend. V.

⁸ U.S. CONST. art. III, § 1 (granting federal judges tenure “during good Behaviour” and prohibiting salary reductions “during their Continuance in Office”).

⁹ *Marbury*, 5 U.S. 177-78.

¹⁰ U.S. CONST. art. I, § 9, cl. 2. The restriction on suspension of habeas corpus appears in the article on legislative powers, implying that only Congress may suspend the Great Writ.

¹¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

the Constitution makes our duly ratified international treaties part of the “supreme law of the land.”¹²

The wisdom of these precepts is now confirmed, not only by our own history, but also by their nearly universal adoption by international human rights law and by the constitutional practice of other democracies. Among other relevant treaties, the United States has joined most nations and nearly all democracies in ratifying the International Covenant on Civil and Political Rights, which requires judicial review of all detentions,¹³ and the Convention against Torture, which prohibits not only torture, but also any form of cruel, inhuman or degrading treatment.¹⁴

These treaties apply in war as well as in peace (although during war they must be interpreted in light of the laws of war).¹⁵ The Geneva Conventions likewise require the status of a prisoner, in case of any doubt, be reviewed by a “competent tribunal.”¹⁶ The Geneva Conventions and elemental principles of the laws of war also prohibit torture and other abuse.¹⁷

In evaluating executive excesses in the treatment, interrogation, detention and trial of suspects and captured combatants in the “war” against terrorism, what is at stake is not only respect for the human rights of the prisoners, but the very fabric of our system of the rule of law. To the extent the Commander in Chief claims implicit “war powers” to act beyond the boundaries set by Congress, beyond review by

¹² U.S. CONST. art. VI.

¹³ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 9.4, Annex (Dec. 16, 1966), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf>. One-hundred and fifty-five states are signatory-parties as of Jan. 26, 2006, *see* <http://www.ohchr.org/english/countries/ratification/3.htm>.

¹⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [hereinafter Convention Against Torture] G.A. Res. 39/46, arts. 2.2, 16.1, U.N. Doc. A/RES/39/46/Annex (Dec. 10, 1984), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/460/23/IMG/NR046023.pdf>. One-hundred and forty-one states are signatory parties as of Jan. 26, 2006, *see* <http://www.ohchr.org/english/countries/ratification/9.htm>.

¹⁵ *E.g., id.* at art. 2.2 (Convention Against Torture); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. No. 131 at 41 (July 9), <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

¹⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

¹⁷ *E.g., id.* at art. 3.1(a), (c), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (banning “cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”).

independent courts, and beyond recognition of any rights for the prisoners, he champions the rule of men, not the rule of law. The good intentions of the Commander in Chief are no substitute for checks and balances. The framers understood this. So must we.

II. TORTURE AND ABUSE OF PRISONERS

International law unconditionally prohibits torture in all circumstances.¹⁸ For example, the Convention against Torture, to which the U.S. is a party, makes clear: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁹

However, until recent legislation enacted in December 2005, the position of the Bush Administration was—and possibly remains—that torture is prohibited by U.S. *policy*, but not by *law* in at least two circumstances.

First, against foreign citizens overseas.²⁰ As late as December 2005, the Administration claimed that foreign citizens have no substantive rights under the United States Constitution when detained by the U.S. outside our borders.²¹ By the government’s logic, foreign citizens detained outside the U.S. borders may legally be tortured.

The second circumstance in which the Administration asserts the legality of torture is in the “war” against terror.²² The government does not concede that torture is legally barred when the President, acting as Commander in Chief, determines torture is necessary to conduct war.²³ This argument debuted in the infamous August 2002 memorandum on torture from the Justice Department Office of Legal Counsel.²⁴ The torture memo opined that any law or treaty purporting to bar the Commander in Chief from authorizing torture would unconstitutionally infringe on his power to conduct war.²⁵ Although officially with-

¹⁸ Convention Against Torture, *supra* note 14, at art. 2.2.

¹⁹ *Id.*

²⁰ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

²¹ *Id.*

²² Memorandum for Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A 2, 35 (Aug. 1, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

drawn in the wake of the Abu Ghraib scandal, the December 2004 replacement memo, while correcting other flaws, expressly declined to address this issue.²⁶

Moreover, while U.S. policy bars torture, it does not prohibit the use of other abusive techniques against foreign citizens abroad.²⁷ Under the government's theory that foreign citizens overseas had no rights at all, it followed they could legally be subjected to cruel, inhuman, or degrading treatment. Thus, the government authorized and used techniques such as "waterboarding" (simulated drowning).²⁸ In the fall of 2005, during congressional consideration of a bill to ban cruel, inhuman or degrading techniques, Vice President Dick Cheney repeatedly (and unsuccessfully) lobbied Senator John McCain to exempt the CIA.²⁹

These Administration positions were, in this author's judgment, untenable in law. However, the legal landscape has now changed dramatically. In December 2005, with overwhelming bipartisan support, Congress passed and the President signed the Detainee Treatment Act of 2005.³⁰ The Act includes two provisions chiefly sponsored by Senator McCain, a former U.S. prisoner of war who was tortured by the North Vietnamese.³¹ The first provision effectively overrules the Administration's claim that foreign citizens abroad have no legal rights, by prohibiting cruel, inhuman or degrading treatment of anyone in U.S. custody or physical control, "regardless of nationality or physical location," and without any "geographical limitation."³²

Even so, the Administration still clings to its argument that Congress could not constitutionally ban abusive techniques in the "war against terror."³³ In signing the bill, the President stated that the execu-

²⁶ Memorandum for James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C., §§ 2340-2340A 2 (Dec. 30, 2004), <http://www.usdoj.gov/olc/dagmemo.pdf>.

²⁷ See generally, *id.*

²⁸ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01.

²⁹ Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, Oct. 25, 2005, at A16.

³⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001, 119 Stat. 2680, 2739 (2005).

³¹ Josh White & Charles Babington, *House Supports Ban on Torture; Measure Would Limit Interrogation Tactics*, WASH. POST, Dec. 15, 2005, at A1.

³² Detainee Treatment Act of 2005, § 1003.

³³ Press Release, President's Statement on Signing of H.R. 2863, the Dep't of Def., Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), [http:// www.whitehouse](http://www.whitehouse)

tive branch would “construe” the ban on abusive techniques “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.”³⁴

Although this statement is couched in legalese, the implication is plain: our President refuses to unconditionally accept a congressional ban on abusing prisoners, which, in turn, implements U.S. treaty obligations under the Convention against Torture.³⁵ Under the theory purportedly preserved by the President’s signing statement, no source of law, whether domestic or international, can restrain the presidential exercise of an implied power as Commander in Chief to abuse prisoners in the course of a war. The effect of this claim of implied authority to torture, despite statutory and treaty prohibitions, is to place the President above the law. It will be so perceived abroad.

The second provision in the McCain bill gives specific guidance to the military, but it does not apply to the CIA.³⁶ It mandates that no prisoner in U.S. military custody or detained in a military facility be subjected to any technique not authorized by the U.S. Army Field Manual.³⁷ According to news reports, an amended version of the Army Field Manual, due for release in early 2006, will expressly ban such techniques as forced nudity and use of dogs to intimidate prisoners.³⁸ This may help repair some of the damage done by the worldwide publication of photos of U.S. guards using snarling dogs to menace naked prisoners at Abu Ghraib.³⁹

The provision does not cover CIA interrogations (except when conducted on a military base).⁴⁰ CIA interrogations off-base are limited only by the general ban on “cruel, inhuman or degrading” techniques.⁴¹ Unless the Justice Department concludes that forced nudity and threatening dogs fall within this ban—which, one fears, it might

.gov/news/releases/2005/12/20051230-8.html.

³⁴ *Id.*

³⁵ Detainee Treatment Act of 2005 § 1003.

³⁶ Detainee Treatment Act of 2005 § 1002.

³⁷ Detainee Treatment Act of 2005 § 1002.

³⁸ E. Schmitt, *New Army Rules May Snarl Talks With McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1.

³⁹ Greg Miller, *Army Puts a New Face on Interrogations; The Military Broadens Its Pool of Specialists and Retools Its Approach to Gathering Intelligence*, L.A. TIMES, July 24, 2005, at A1.

⁴⁰ Detainee Treatment Act of 2005 § 1002.

⁴¹ Detainee Treatment Act of 2005 § 1003.

not⁴²—nothing in the new law prohibits the CIA from using some of the very techniques that made Abu Ghraib infamous.

Another provision in the new law authorizes “Combatant Status Review Tribunal[s]” (administrative boards established by the military to determine whether prisoners are enemy combatants) to consider evidence exacted by “coercion,” so long as the Tribunal deems it to have “probative value.”⁴³ Unless this provision is construed to require the suppression of statements obtained by torture, this appears to violate the U.S. treaty commitment under the torture convention, which stipulates: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”⁴⁴

Many other nations routinely torture prisoners in fact, even though they prohibit it in law.⁴⁵ The U.S. is far from the most culpable country when it comes to abusing prisoners in practice. What stands out is our unique claim of a legal right to do so. What other nation in the world openly reserves the supposed right of its executive to authorize torture, or of its military boards to consider evidence adduced by torture? None comes to mind. If the United States hopes to reclaim the moral high ground in the battle for world public opinion, we will need to do better.

III. PROLONGED ARBITRARY DETENTIONS AT GUANTANAMO

Among the most fundamental safeguards of human rights are due process of law and the Great Writ—habeas corpus—which guarantees prisoners the right to petition an independent court to review the lawfulness of an executive detention.⁴⁶ Yet, until rebuffed by the Supreme

⁴² See Detainee Treatment Act of 2005 § 1003(d). The definition of cruel, inhuman, or degrading treatment is coterminous with that provided “by the Fifth, Eighth, and Fourteenth Amendments . . . as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture.” § 1003 (d).

⁴³ Detainee Treatment Act of 2005 § 1005(b) (1).

⁴⁴ Convention Against Torture, *supra* note 14, at art. 15.

⁴⁵ See Convention Against Torture, *supra* note 14, at arts. 2.2, 16.1 (Morocco, Egypt, and Jordan are all contracting parties to the Convention Against Torture). *But see* Priest, *supra* note 28, at A01, “years of State Department human rights reports accuse all three of chronic prisoner abuse.”

⁴⁶ See *Immigration & Naturalization Serv. v. St. Cyr.*, 533 U.S. 289, 301 (2001):

Court in 2004,⁴⁷ the Administration claimed the right to imprison terror suspects at the U.S. Naval Base in Guantanamo Bay, Cuba—for the duration of the “war” against terrorism without a right to judicial review of their detention.⁴⁸ Prisoners were detained solely on the basis of secret intelligence information unknown to anyone outside the executive branch, without criminal charges, and with no access to lawyers or courts, by habeas or otherwise.⁴⁹

That extraordinary claim—amounting to an executive prerogative to impose what could be a life sentence of imprisonment, without due process of law—astounded legal observers around the world.⁵⁰ Those who share our common law heritage of habeas corpus were especially distressed.⁵¹ In 2002, a British appeals court expressed “deep concern that, in apparent contravention of fundamental principles of law, [a prisoner at Guantanamo] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.”⁵² The court termed Guantanamo a “legal black-hole.”⁵³

At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest. . . . In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.

Id. (citations omitted) (holding Acts of Congress did not remove the jurisdiction of the court over an alien’s right of habeas corpus).

⁴⁷ See *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (holding that the aliens being held indefinitely at Guantanamo Bay had the right for their habeas corpus claims to be heard in the district court).

⁴⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (2004).

⁴⁹ *Id.* “[T]he Government’s most extreme rendition of this argument, . . . [would] eliminate entirely any individual process.” *Id.*

⁵⁰ See Erwin Chemerinsky, *Wartime Security and Constitutional Liberty: Detainees*, 68 ALB. L. REV. 1119, 1120-22 (2005) (criticizing the Bush administration’s attempt to deprive the Guantanamo Bay detainees of due process); Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 229 (2003) (expressing alarm at the use the executive power to hold the Guantanamo Bay detainees and others without due process of law and denying them the writ of habeas corpus).

⁵¹ See Brief for the Commonwealth Lawyers Association as Amicus Curiae in Support of the Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2003 WL 22490562.

⁵² *Abbasi v. Secretary of State*, [2002] EWCA (Civ) 1598, [107], 2002 All E.R. 70 (U.K. Ct. App.) (Eng.).

⁵³ *Id.* at [64], 2002 All E.R. at 70.

The following year Lord Steyn, a senior British Law Lord, publicly condemned the detentions at Guantanamo as a “monstrous failure of justice.”⁵⁴ The very purpose of imprisoning people at Guantanamo, he noted, was “to put them beyond the rule of law.”⁵⁵

In an *amicus* brief before the United States Supreme Court, the Commonwealth Lawyers Association, consisting of all law societies and bar associations in the 53 Commonwealth member countries, advised that “if it were the United Kingdom and not the United States which controlled . . . Guantanamo . . . English courts . . . would assume jurisdiction to issue writs of *habeas corpus* . . . We believe that the same position would also apply [in the courts of] . . . any other Commonwealth state.”⁵⁶

Hundreds of prisoners have been held at Guantanamo for periods of up to four years.⁵⁷ During the first two years, they were afforded no legal process at all.⁵⁸ Only after the Supreme Court granted review in the Guantanamo cases did the Pentagon devise a system of reviews by “combatant status review tribunals,” followed by annual administrative reviews of detentions.⁵⁹ Yet these procedures fall short of the minimum requirements of due process.⁶⁰

In the wake of the Supreme Court’s ruling⁶¹ that U.S. courts have jurisdiction to hear petitions, a more defensible review by independent courts was sought by scores of habeas corpus petitions filed on behalf Guantanamo detainees.⁶² Nevertheless, in the Detainee Treatment Act

⁵⁴ Edward Alden, *Guantanamo Bay’s ‘Moral Black Hole,’* FINANCIAL TIMES, Dec. 31, 2003, at 8.

⁵⁵ *Id.*

⁵⁶ Brief for the Commonwealth Lawyers Association, *supra* note 51, at 3.

⁵⁷ *Australian Newspaper Highlights*, ASIA PULSE, Mar. 6, 2006, § Nationwide International News.

⁵⁸ *High Court to Hear Case of Detainees Held at Base: Guantanamo Decision Should Shed Light on Future of Bush’s Anti-Terror Policies*, SEATTLE TIMES, Nov. 11, 2003, at A1.

⁵⁹ Neil A. Lewis, *U.S. Lawyer is Questioned Over Rights of Detainees*, N.Y. TIMES, Sept. 9, 2005, at A16.

⁶⁰ *See, e.g.,* In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

⁶¹ *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

⁶² First Post-Supreme Court Habeas Petitions Filed on Behalf of Detainees at Guantanamo Bay, CCR Coordinates Law Firms to Secure Adequate Representation of Detainees, <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=pQOvjvVXXX&Content=406>. *See also* Petition for Writ of Habeas Corpus at 16, *Anam v. Bush*, (D.D.C. July 14, 2004), <http://www.ccr-ny.org/v2/legal/docs/Yemeni%20Petition.pdf>; Petition for Writ of Habeas Corpus at 7, *Kurnaz v. Bush*, (D.D.C. July 2, 2004), <http://www.ccr-ny.org/v2/legal/docs/DC%20Dist%20Kurnaz%20Petition>

of 2005, Congress barred any further habeas petitions from Guantanamo, substituting instead a more limited judicial review by the U.S. Court of Appeals for the District of Columbia.⁶³ Review will now be confined to whether combatant status review tribunals are in compliance with Pentagon procedures, and whether those procedures comply with the U.S. Constitution and laws.⁶⁴ The issue of whether prisoners have been tortured in violation of the Convention against Torture may be ruled outside the permissible scope of judicial review. Whether the new Act will force the dismissal of all the pending habeas petitions, as the government now insists, remains to be seen.⁶⁵

Guantanamo has become a global symbol of American efforts to bypass the rule of law in the “war” against terrorism. The new, congressionally mandated judicial review is far better than the Administration’s original claim of executive power to imprison people indefinitely with no judicial review whatsoever. But will the new limitations on judicial review prevent judges from overcoming that legacy of lawlessness? The world will be watching.

IV. MILITARY COMMISSION TRIALS

Hundreds of prisoners have been held at Guantanamo for years without criminal charges or trials.⁶⁶ However, the Pentagon has re-

%207%202%2004.pdf; Petition for Writ of Habeas Corpus at 9-10, *Begg v. Bush*, (D.D.C. July 2, 2004), <http://www.ccr-ny.org/v2/legal/docs/DC%20Dist%20Begg%20Petition%207%202%2004.pdf>; Petition for Writ of Habeas Corpus at 7, *Khadr v. Bush*, (D.D.C. July 2, 2004), <http://www.ccr-ny.org/v2/legal/docs/DC%20Dist%20Khadr%20Petition%207%202%2004.pdf>; Petition for Writ of Habeas Corpus at 13-14, *Benchellali v. Bush*, (D.D.C. July 6, 2004), http://www.ccr-ny.org/v2/legal/docs/Filed_Benchallali.pdf; Petition for Writ of Habeas Corpus at 14, *Abdah v. Bush*, (D.D.C. July 27, 2004), <http://www.ccr-ny.org/v2/legal/docs/Abdah%20Habeas%20Petition%2004-1254.pdf>; Petition for Writ of Habeas Corpus at 10, *Boumediene v. Bush*, (D.D.C. July 8, 2004), http://www.ccr-ny.org/v2/legal/september_11th/docs/Boumediene%20_HabeasPetitionDCDist_7_9_04.pdf; Petition for Writ of Habeas Corpus at 9-10, *Almurbati v. Bush*, (D.D.C. July 21, 2004), <http://www.ccr-ny.org/v2/legal/docs/Bahraini%20petition.pdf>.

⁶³ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (2005) (amending 28 U.S.C. § 2241).

⁶⁴ Detainee Treatment Act of 2005 § 1005(e).

⁶⁵ Detainee Treatment Act of 2005 § 1005(h); see also Neil Lewis, *U.S. to Seek Dismissal of Guantanamo Suits*, N.Y. TIMES, Jan. 4, 2006, at A11.

⁶⁶ Anthony Harwood, *Law v. War: US Court Lets Guantanamo Captives Fight for Freedom*, THE MIRROR (Eng.), June 29, 2004, at 2; see also *U.S. Charges 10th Guantanamo Detainee*, L.A. TIMES, Jan. 21, 2006, at A10; see also Elaine

ferred a handful of prisoners for trial by military commission.⁶⁷ Such commissions have not been used since the World War II era.⁶⁸ Among other questionable procedures, and contrary to the practice in our courts, the military commissions deny the accused and his civilian defense counsel (if any) access to classified prosecution evidence, and until recently, they also barred any appeal to the courts.⁶⁹ Because of ongoing challenges in U.S. courts (now pending before the Supreme Court), no military commission trials were actually conducted by year-end 2005.⁷⁰

Other democracies disdain these shortcut military trials. For example, when the Pentagon proposed to prosecute several British prisoners at Guantanamo, British Attorney General Peter Goldsmith called military commission trials “unacceptable,” adding “there are certain principles on which there can be no compromise Fair trial is one of those.”⁷¹ Throughout lengthy negotiations, Lord Goldsmith “would not budge from a basic demand: that verdicts of military commissions be reviewed by civilian courts.”⁷² Washington finally gave up, and four British prisoners at Guantanamo were returned to Britain, where they were released without being charged or tried.⁷³

The Detainee Treatment Act of 2005 now provides for judicial review, but only after a military commission trial has been fully conducted.⁷⁴ Based on the Act, the government has asked the Supreme

Sciolino, *4 Detainees Are Returned to France After 2 Years at Guantanamo*, N.Y. TIMES, July 28, 2004, at A5.

⁶⁷ Maggie Farley, *The World; The U.S. Rejects Guantanamo Report; The White House Says the U.N. Was Taken in by Terrorists' Claims of Torture and Abuse*, L.A. TIMES, Feb. 17, 2006, at A4.

⁶⁸ See *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (holding enemy belligerents who violate the laws of war can be tried by military commissions).

⁶⁹ Demetri Sevastopulo, *U.S. Changes Rules to Curb Guantanamo Trial Critics*, FINANCIAL TIMES (London), Sept. 1, 2005, at 8 (World News). However, detainees will be allowed to hear classified evidence if they would be denied a fair trial otherwise. *Id.*

⁷⁰ See generally *Hamdan v. Rumsfeld*, 344 F.Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F. 3d 33 (D.C.Cir. 2005), *cert. granted*, 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

⁷¹ Reuters, *Briton Condemns Proposed U.S. Trials*, N.Y. TIMES, June 26, 2004, at A7.

⁷² Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1.

⁷³ Mark Huband, *Britons' Release Throws Up More Guantanamo Doubts*, FINANCIAL TIMES (London), Jan. 28, 2005, at 11 (The Americas).

⁷⁴ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3)(C)(ii), 119 Stat. 2680, 2743 (2005) (amending 28 U.S.C. § 2241).

Court to drop its pretrial review of the first military commission case, and to defer any potential review until after the trial and all military reviews have been completed.⁷⁵

V. CONCLUSION

The foregoing review of torture, cruel treatment, prolonged arbitrary detentions and structurally unfair trials does not cover the full range of U.S. excesses in responding to terrorism. Among other practices that appall even our friends are ghost prisons (whose locations are kept secret), ghost prisoners (whose names and locations are unknown, even to the Red Cross), and our extraordinary rendering of prisoners to other countries known to engage in torture.⁷⁶ The cumulative effect of these excesses has been to diminish American stature in the world and to attain the seemingly unthinkable – to generate global public sympathy for detained terrorists.

The resulting damage to American foreign policy was eloquently articulated by a group of former U.S. diplomats in their *amicus* brief to the Supreme Court in the Guantanamo case.⁷⁷ They counsel against the Administration's contention "that the executive branch may imprison whom it will and do so beyond the reach of due process of law."⁷⁸ That contention, they argue, "demeans and weakens this nation's voice abroad."⁷⁹

It thereby also hands our enemies a victory on a vital moral, diplomatic and political front in the "war" against terrorism. While human dignity does not hang on every change in judicial review procedures, the universal conscience is offended by such egregious violations as torture, cruel treatment, prolonged detention without any legal process, and military commission trials that shortcut basic standards of fair trial. In the interest of both principle and pragmatism, the time has come to renew and strengthen our national commitment to respect human rights and dignity in the "war" against terrorism.

⁷⁵ AP, *National Briefing Washington: Administration Asks Justices to Dismiss Appeal*, N.Y. TIMES, Jan. 13, 2006, at A14.

⁷⁶ Priest, *supra* note 28, at A01.

⁷⁷ Brief of Diego Asencio et al. as Amici Curiae in Support of the Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) at 11.

⁷⁸ *Id.*

⁷⁹ *Id.*

