



# The US must protect Habeas Corpus

Recommendation to  
the US President  
the US Congress

by André Nilsen

Recognizing the fundamental values of human civilization, the core obligations in international law and the US Constitution, and the essential interests of the United States, the US President and the US Congress should now fully comply with and completely refrain from attempts at circumventing the US Supreme Court's restoration of habeas corpus in *Boumediene*

*v. Bush*, while globally and permanently upholding the highest human, legal, civil, and political rights, including renouncing torture and other cruel, inhuman, or degrading treatment or punishment, and immediately closing Guantánamo Bay and all other parts of its global detention network.

## MAIN POINTS

The US should uphold the highest human, legal, civil, and political rights, including the ban on torture and habeas corpus, while closing Guantanamo Bay and global detention centers. International law and the constitution must be respected by the President and Congress and enforced by the Supreme Court.

## ABOUT THE AUTHOR

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## U S C O N S T I T U T I O N

The 1215 Magna Carta established the right of freedom from unjustified imprisonment. This right is enforced by means of the writ of habeas corpus, which provides detainees with the right to challenge the legality of their detention in court.

Centuries later that right was at the heart of the framing of the US Constitution, with founding father Alexander Hamilton in Federalist Paper No 84 warning that “the practice of arbitrary imprisonments, in all ages, is the favorite and most formidable instruments of tyranny”. The US Constitution therefore in Article I, Section 9, Clause 2 establishes that “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”. The United States is currently, needless to say, facing neither rebellion nor invasion.

The US Code in 28 U.S.C. Section 2241 and case law reflects that the US Supreme Court and US federal courts over time have gained extended jurisdiction and established broad authority over habeas corpus.

Habeas corpus as a vital foundation of human civilization is protected not only by the US Constitution but also by international law.

## I N T E R N A T I O N A L L A W

International law, as defined by jus cogens, customary law, and treaties law, widely upholds habeas corpus.

In international humanitarian law, which applies specifically inside situations of armed conflict, the Geneva Conventions with regards to non-international conflicts in Common Article 3 (1) (d) prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” hence including habeas corpus while regarding international conflicts allowing temporary suspension of habeas corpus but only for the duration of hostilities and subject to conditions.

As to detainee status, the International Committee of the Red Cross in its commentary to the Fourth Convention states as “a general principle which is embodied in all four Geneva Conventions of 1949”

that “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention [or] a civilian covered by the Fourth Convention [...] There is no intermediate status; nobody in enemy hands can be outside the law”.

In international human rights law, which applies generally inside as well as outside situations of armed conflict, the International Covenant on Civil and Political Rights provides in Article 9 (1) that “no one shall be subjected to arbitrary arrest or detention”, in Article 9 (4) that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”, and in Article 16 that “everyone shall have the right to recognition everywhere as a person before the law”.

Article 4 (1) and (2) stipulates that Article 16 can never be derogated from, not even “in time of public emergency which threatens the life of the nation”. Moreover, although Article 9 and complementary Article 14 are not among the non-derogable provisions, the Human Rights Committee in its general comment No 29

(2001) states that “procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”, so the key elements of Articles 9 and 14, such as habeas corpus, the presumption of innocence, and minimum fair trial rights, must always be fully respected, although in cases of armed conflict they will be interpreted in light of international humanitarian law.

Neither the US war on terror nor US ongoing military operations constitute international armed conflicts in accordance with international law, so Guantánamo Bay is straightforwardly subject to international human rights law. The United States has moreover not notified any derogations from the International Covenant on Civil and Political Rights, so Articles 9 and 14 remain in full force.

## CONSTITUTIONAL BATTLES

The US President with support from the US Congress has four times attempted to abolish habeas corpus for the individuals detained indefinitely at Guantánamo Bay but the US Supreme Court and US federal courts have on each occasion restored it.



On 13 November 2001, the US President in the first of a series of Military Orders defined the legal regime at Guantánamo Bay, including abolishing habeas corpus and establishing military commissions.

On 28 June 2004, the US Supreme Court in *Hamdi v. Rumsfeld* reconfirmed that habeas corpus is enjoyed by US citizens even when declared enemy combatants and in *Rasul v. Bush* reaffirmed that US federal courts have jurisdiction over habeas corpus also for non-citizens at Guantánamo Bay given the effective control by the United States despite the formal sovereignty of Cuba.

On 7 July 2004, the US President established the Combatant Status Review Tribunal (CSRT) to assess the legality of detentions in an effort to avoid providing the detainees with access to US federal courts as ordered by the US Supreme Court ruling.

On 31 January 2005, the US District Court for the District of Columbia in *In re Guantánamo Detainee Cases* decided that the CSRT “deny [the detainees] a fair opportunity to challenge their incarceration” and thus fail to comply with the US Supreme Court ruling.

On 30 December 2005, the US Congress and the US President through the 2005 Detainee Treatment Act (DTA) stripped US federal courts of jurisdiction over habeas corpus at Guantánamo Bay – providing that “no court, justice, or judge shall have jurisdiction to hear or consider [...] an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay” – and vested the US Court of Appeals for the District of Columbia Circuit with exclusive but severely limited and biased review of the CSRT and military commissions.

On 29 June 2006, the US Supreme Court in *Hamdan v. Rumsfeld* rejected that the DTA precluded US federal courts from jurisdiction over habeas corpus at Guantánamo Bay and ruled that the Military Order’s military commissions violated the US Uniform Code of Military Justice and the Geneva Conventions.

On 17 October 2006, the US Congress and the US President through the 2006 Military Commissions Act (MCA) abolished habeas corpus for non-citizens determined to be “enemy combatants” or “awaiting such determination” at the discretion of the US President with no right of appeal and ratified the DTA’s severely limited and biased review of the CSRT and military commissions as a substitute for habeas corpus.

On 20 February 2007, the US Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush* upheld the MCA.

The US Supreme Court in *Boumediene v. Bush* on 2 April 2007 refused but on 29 June 2007 – in its first reversal in 60 years – agreed to hear the appeals of the detainees and on 12 June 2008 ruled that the MCA's Section 7 is unconstitutional in abolishing habeas corpus, that the detainees have a constitutional right to seek a writ of habeas corpus in US federal courts, and that the DTA's severely limited and biased review of the CSRT and military commissions fails to provide an adequate substitute for habeas corpus.

## CONSTITUTIONS, POWERS, AND RIGHTS

The US Supreme Court in its latest ruling declares that “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”, warns that “to hold that the political branches may

switch the constitution on or off at will would lead to a regime in which they, not this court, ‘say what the law is’”, and notes that “the habeas writ is itself an indispensable mechanism for monitoring the separation of powers”.

Constitutions are critical in defining separation of powers and enforcing checks and balances among branches of government, in providing foundations for and imposing limitations on the legality of legislative acts, judiciary rulings, executive decisions, and administrative actions, in defining the social contract as a basis for popular sovereignty and enforcing regular elections as a mechanism for government accountability, and in defining and upholding human, legal, civil, and political rights of citizens and non-citizens. Constitutions thus create freedom, democracy, rule of law, and limited government, thereby enabling humanity and civilization to progress from a state of nature ruled by fear to a state of society governed by justice. It is very simple: No one is above the constitution. And no one is beyond the constitution.

Just as in the United States so also in the United Kingdom however an executive that is authoritarian at home and aggressive abroad in conspiracy with a legislature that is morally spineless and



politically servile has sought to subvert the constitution by aggrandizing government power while demolishing individual rights.

### S U P R E M E C O U R T S , P O L I T I C S , A N D P R I N C I P L E S

Supreme courts must therefore be the guardians of constitutions. Whereas the problem in the United Kingdom is that no proper one exists, the risk in the United States is that a reactionary one prevails.

The US Supreme Court is currently divided in two factions, a 5 justices strong liberal majority wing and a 4 justices strong reactionary minority group.

This can be clearly seen from the voting record on the above cases: Anthony M. Kennedy (b. 1936, n. Reagan, a. 1988): Boumediene maj., Hamdan partial maj., con., Rasul con., Hamdi maj.; John Paul Stevens (b. 1920, n. Ford, a. 1975): Boumediene maj., Hamdan maj., Rasul maj., Hamdi diss.; Stephen G. Breyer (b. 1938, n. Clinton, a. 1994): Boumediene maj., con., Hamdan maj., con., Rasul maj., Hamdi maj.; Ruth Bader Ginsburg (b. 1933, n. Clinton, a. 1993): Boumediene maj., con., Hamdan maj., con., Rasul maj.,

Hamdi con./diss.; and David H. Souter (b. 1939, n. G. H. W. Bush, a. 1990): Boumediene maj., con., Hamdan maj., con., Rasul maj., Hamdi con./diss. make up the liberal wing whereas John G. Roberts Jr. (b. 1955, n. G. W. Bush, a. 2005): Boumediene diss., Hamdan recused, Rasul n.a., Hamdi n.a.; Samuel A. Alito Jr. (b. 1950, n. G. W. Bush, a. 2006): Boumediene diss., Hamdan diss., Rasul n.a., Hamdi n.a.; Antonin Scalia (b. 1936, n. Reagan, a. 1986): Boumediene diss., Hamdan diss., Rasul diss., Hamdi diss.; and Clarence Thomas (b. 1948, n. G. H. W. Bush, a. 1991): Boumediene diss., Hamdan diss., Rasul diss., Hamdi diss. constitute the reactionary group.

Whereas in the reactionary group only one justice is born in the 1930s, another is born in the late 1940s, and two are born in the 1950s, however, on the liberal wing all 5 justices are born in either the 1920s or the 1930s. Likely several and possibly all 5 justices may accordingly retire during the next four years and certainly over the coming eight years. When George W. Bush leaves office on 20 January 2009, his successor can therefore look forward to shaping the US Supreme Court for decades to come.

## RECOMMENDATIONS

After six years, the United States still illegally holds 270 prisoners at Guantánamo Bay – a camp which is not only a legal black hole lacking habeas corpus and fair trials but according to the United Nations in its nature and operation “amounts to torture” and according to the International Committee of the Red Cross constitutes “an intentional system of cruel, unusual and degrading treatment and a form of torture” – as well as quite possibly an unknown number prisoners in other parts of its global detention network – locations which quite likely exhibit even graver breaches of human, legal, civil, and political rights, including torture.

The United States should now:

First, bring to a halt all its breaches of international law and the US Constitution by fully complying with and completely refraining from attempts at circumventing the US Supreme Court’s restoration of habeas corpus in *Boumediene v. Bush*, by globally and permanently upholding the highest human, legal, civil, and political rights, including renouncing torture and other cruel, inhuman, or degrading treatment or punishment, and by immediately closing Guantánamo Bay and all other parts of its global abduction, rendition, detention, and interrogation system.

Second, ascertain complete truth by immediately establishing an independent inquiry commission of high level personalities with sufficient rights, powers, and resources to conduct an extensive in-depth investigation into the war on terror, covering all national and global activities, all US and foreign agencies, and the entire chain-of-command, up to and including the US President, with full transparency of all proceedings, open hearings of all witnesses, and complete disclosure of all findings.

Third, enforce full justice by urgently investigating, arresting, prosecuting, trying, and punishing all individuals who have been responsible for, involved with, or complicit in illegal activities, up to and including the US President.

Fourth, restore respect for international law and the US Constitution by rejecting the war on terror as a legitimate premise for the conduct of public policy and international affairs and by reversing the moral decay that in its most egregious expression led the US President and the US Congress to not only abolish habeas corpus and fair trials but twist, narrow, and undercut the definitions, prohibitions, and punishability of torture.



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