Introduction

The U.S. detention center at the Guantánamo Bay Naval Base in Cuba has long been synonymous with torture, secrecy, and the abuse of executive power. It has come to epitomize lawlessness in the eyes of the world. Created in the name of protecting the country, Guantánamo has weakened it, undermining America's security as well as its values.

For too long, however, Guantánamo has been viewed in isolation, overshadowing other abuses and concealing broader shifts in America's national security policy since September 11, 2001. Guantánamo was never simply a prison, nor was it hermetically sealed. Rather, Guantánamo was part of a larger, interconnected global detention system that included other military prisons such as the Bagram Air Base in Afghanistan, secret CIA jails, and the transfer of prisoners to other countries for torture. This system encompassed even the military detention of individuals arrested inside the United States, whom President George W. Bush claimed he could hold indefinitely without charge as part of a “war on terrorism” without geographic or temporal bounds. Guantánamo, in short, was like an island in an archipelago of U.S. detention operations: the most visible example of a larger prison system designed to operate outside the law.

This system grew out of a series of decisions by Bush administration officials following the terrorist attacks of September 11. The Bush administration wanted to treat terrorism as an armed conflict rather than criminal activity and yet also wanted to avoid the limits that the law imposes on the detention and treatment of prisoners during wartime. In addition, the administration tried to create a category of prisoners without legal protections in order to justify a state-sanctioned policy of torture and other cruel and inhuman treatment. In this newly envisioned detention system, prisoners could be held indefinitely, potentially forever, without charge and without a meaningful hearing. The only trials were to be held in jerry-rigged military commissions that fell far short of constitutional and international standards. This system was intended to exist not only beyond the law but also beyond the
reach of any court, as the Bush administration took every possible measure to prevent judges from examining its detention and treatment of prisoners held as “enemy combatants.” Its goal was to imprison and interrogate without constraint or scrutiny.

The U.S. government’s detention policies sparked intense legal battles. At the center of many of them was habeas corpus. Habeas corpus has long served as the preeminent safeguard of individual liberty and check against arbitrary government power by mandating that the state justify a prisoner’s detention before a judge. The use of habeas, however, had changed over time, becoming principally a remedy for prisoners challenging their convictions based on constitutional defects at trial. After 9/11, habeas resumed its historic function as a remedy for executive imprisonment without trial. In three decisions since 9/11, the United States Supreme Court vindicated the importance of habeas by upholding the right of Guantánamo detainees to access U.S. courts, including two cases in which Congress had tried to strip the detainees of that right. In these rulings, the Court rejected the president’s claim that he could detain prisoners without legal protections or hold them indefinitely without judicial review simply by imprisoning them outside the United States.

These victories, however, were both limited and incomplete. Although the Supreme Court rejected the notion that the Constitution necessarily stops at America’s shores and upheld the right of Guantánamo detainees to habeas corpus, it did not guarantee judicial review of detention operations at other overseas prisons. The Court also did not grapple with other important questions in these cases or in its other “war on terror” decisions. It did not, for example, address who could be detained as an “enemy combatant” other than someone who was captured in Afghanistan while engaging in hostilities against U.S. or allied troops on behalf of Taliban forces. The Court thus failed to take on the president’s claim that the entire world was a battlefield and that even individuals who were arrested in civilian settings in the United States and who never took part in hostilities on a battlefield (or anywhere else), could be treated as “combatants” and thereby denied the right to a criminal trial.

Other limits were inherent in the nature of habeas corpus itself. Habeas had proved its resilience in securing court review for prisoners at Guantánamo, where the fact of U.S. detention was clear and undisputed. But it was less effective where the United States sought to conceal its custody of or control over prisoners, whether by holding them in secret or enlisting another nation to detain them on its behalf. Similarly, habeas had shown a limited capacity to obtain judicial review over the rendition of prisoners to other countries for torture and continued detention. Habeas had also proved
vulnerable in cases in which a court had found the detention by the United States to be illegal but believed that it lacked the authority to order the prisoner’s release where release in the United States was the only available remedy since the detainee could not be safely returned home or repatriated to a third country.

The arrival of a new administration offered hope and the promise of change. President Barack Obama began with bold strokes, banning torture and ordering the closure of the prison at Guantánamo within a year. But the decisions in the following months suggested that most of these changes were small, if not cosmetic, and left the outgoing administration’s policies intact in important respects. For example, Obama revived military commission trials and continued the indefinite detention of suspected terrorists without charge, two centerpieces of the Bush administration’s “war on terror.” Obama also resisted transparency in many cases and sought to deny torture victims access to U.S. courts based on exaggerated claims of government secrecy that served to conceal government misconduct and abuse. The Supreme Court had left Obama no choice but to accept habeas corpus jurisdiction at Guantánamo. But Obama tried to defend the executive’s power to hold prisoners elsewhere without judicial review and continued to do so at Bagram, which had replaced Guantánamo as the United States’ principal offshore detention center. In short, even as Obama spoke about the need to restore the rule of law and to return to constitutional principles, he preserved many of his predecessor’s policies, tinkering at the edges but leaving the core intact. By the close of his first year in office, Obama had not only delayed the closing of Guantánamo. He had moved to adopt and institutionalize many of Guantánamo’s key features.

This book describes the rise of the U.S.-run global detention system that emerged after 9/11 and the efforts to challenge it through habeas corpus. It examines both the achievements and the shortcomings of these legal challenges and confronts and repudiates arguments for limiting habeas. Finally, it advocates other measures necessary to prevent lawless detentions in the future and to create a rights-respecting national security policy that keeps America both safe and free.

The book is divided into four parts. The first part (chapters 1 through 4) examines the rise of the interconnected global detention system. Chapter 1 traces the origins of this system to a series of executive branch decisions and legal opinions that opened the door to arbitrary detention, sham military trials, and torture, all without court review. The system was intended to establish a
new paradigm—the “war on terrorism”—in the name of meeting new threats facing the nation. This paradigm gave the president unprecedented powers to detain and interrogate without any restriction, rules, or accountability.

Chapter 2 examines how this new paradigm took shape at Guantánamo. It charts how Guantánamo grew to embody a prison beyond the law, pervaded by illegal detention, abuse, and secrecy. Then chapter 3 describes other offshore U.S. prisons, from the military detention centers in Afghanistan and Iraq to secret CIA jails or “black sites.” The chapter also details the use of extraordinary rendition, in which the United States outsourced torture by sending prisoners to other countries for brutal interrogations that U.S. officials did not want to conduct themselves. Chapter 4 looks at military detentions in the United States, examining three seminal cases in which the Bush administration sought to create a lawless enclave—a new Guantánamo—on American soil. Although few in number, these domestic “enemy combatant” cases represented the most far-reaching assertions of executive detention power in the “war on terrorism.”

The second part (chapters 5 and 6) travels back in time to examine the origins of habeas corpus and its development over the centuries. Chapter 5 explains how habeas corpus came to protect individuals against unlawful imprisonment by the executive. It also discusses the role of habeas during wartime and how habeas helps police the line between civilian and military authority and prevent arbitrary government action. Chapter 6 examines how habeas corpus challenged detentions overseas before 9/11 as well as the principles that governed the extraterritorial application of constitutional rights more generally. It concludes by describing the gradual erosion of the idea that the Constitution’s protections were strictly confined to the United States or to American citizens, a development with significant consequences for post-9/11 habeas cases.

Part 3 (chapters 7 through 9) turns to these cases, highlighting several themes and an enduring tension. The chapters illustrate, on the one hand, how habeas corpus has provided an important check against illegal detention and interrogation in U.S. counterterrorism operations. They also show, on the other hand, how habeas’s checking function has led to continual efforts to undermine it, from congressional court-stripping measures to eleventh-hour machinations by the executive to avoid judicial review.

Chapter 7 discusses the trio of “enemy combatant” cases that reached the Supreme Court in 2004: Rasul v. Bush, Hamdi v. Rumsfeld, and Rumsfeld v. Padilla. These decisions established important principles, including the right of Guantánamo detainees to seek habeas corpus review in federal court and
the right of American citizens to a fair hearing when they are detained by their government, even in time of war. They indicated that the executive would not be able to exclude the judiciary from the “war on terrorism.” But the cases also left open important questions, including who exactly could be detained as an “enemy combatant” and what protections such persons could invoke.

The response by the president and Congress to these rulings is discussed in chapter 8. The Bush administration immediately moved to nullify the Supreme Court’s ruling in *Rasul* by creating a rigged system of military status tribunals intended to ratify prior determinations that prisoners were “enemy combatants” and to prevent habeas hearings from going forward in federal courts, where the administration’s allegations might be carefully scrutinized. Then Congress, at the administration’s urging, passed legislation, the Detainee Treatment Act of 2005, which purportedly stripped federal courts of habeas jurisdiction over Guantánamo detentions altogether. Chapter 8 also describes the landmark Supreme Court ruling that followed, *Hamdan v. Rumsfeld*, which rejected this court-stripping measure, invalidated the president’s military commissions, and concluded that no prisoner could be held without the baseline protections contained in Common Article 3 of the Geneva Conventions.

Chapter 9 examines the political backlash to *Hamdan* that resulted in new court-stripping legislation, the Military Commissions Act of 2006. This legislation purported to deny habeas corpus to any noncitizen held as an “enemy combatant,” not just those held at Guantánamo. It also undermined the Geneva Conventions, sought to immunize U.S. officials for past abuse of detainees, and revived military commissions. The chapter then examines the Supreme Court’s ruling in *Boumediene v. Bush*, decided near the end of the Bush administration. In affirming the right of Guantánamo detainees to habeas corpus, the Court decisively rejected the executive’s claim that the Constitution was limited to the United States or to American citizens. Yet the Court left open important questions about whether habeas corpus reached other offshore prisons. The Court also suggested some limits on the relief that a habeas judge could order in a decision involving two American citizens detained in Iraq that it issued on the same day as *Boumediene*.

The fourth and final part (chapters 10 through 13) provides the broad outline of a legal and sustainable detention policy. As its starting point, it takes the singular importance of habeas corpus as a constraint against the growth of prisons beyond the law. It also explains why habeas alone is insufficient, its potential constrained by a combination of practical limits on its availability and the government’s proclivity to seek new ways to detain and interrogate without judicial oversight.
Chapter 10 argues why habeas corpus should be available to any prisoner in U.S. custody, regardless of his or her citizenship or location. The chapter explains why this review is necessary to help prevent the growth of prisons beyond the law. It also explains why this review, properly understood, does not interfere with the government’s ability to wage war or fight terrorism but instead provides a safeguard against illegal detention and other abuses.

Chapter 11 explores some of the potential limits of habeas corpus. For example, it describes the difficulties of challenging more covert forms of executive action, such as proxy detention and rendition, in which the U.S. role is either concealed or outsourced, and offers some possible solutions. Chapter 12 continues this discussion. It focuses not on where habeas corpus may extend (as chapter 11 does) but on the questions that habeas courts may consider in adjudicating petitions. While habeas corpus provides the opportunity for meaningful judicial review of executive action, the mere availability of that review does not by itself resolve the underlying legal and constitutional questions surrounding the scope of the executive’s legal authority to detain in counterterrorism operations or to hold individuals without criminal trial in the regular federal courts. Chapter 12 argues for restricting that detention authority by returning to the long-standing practice of prosecuting suspected terrorists in civilian courts. The chapter thus argues against indefinite military detention, military commissions, and hybrid proposals like national security courts that sanction imprisonment without trial and the use of adjudicatory tribunals with fewer protections of individual rights.

Chapter 13 summarizes national security policy during President Obama’s first year in office. It contrasts the new president’s initial moves, like ordering Guantánamo’s closure and banning torture, with his subsequent adoption of military commissions and indefinite detention. Chapter 13 shows that despite some positive steps, the Obama administration has largely embraced continuity over change and that key components of the post-9/11 detention system are threatening to become permanent features of America’s legal fabric and political discourse.

The book concludes that the United States’ counterterrorism policy since 9/11 underscores the continued importance of habeas corpus as a safeguard of individual liberty against illegal government action. Despite its limitations, habeas remains the single most important check against arbitrary and unlawful detention, torture, and other abuses. As it did centuries ago for those jailed without trial, habeas today still promises “the water of life to revive from the death of imprisonment.” The threat of terrorism, some people believe, makes
the United States’ historic commitment to habeas unnecessary and unwise. But precisely the opposite is true. The pressure that terrorism puts on government officials to avoid legal limits and to find new ways to imprison allegedly dangerous or suspicious people without charge, due process, or meaningful scrutiny, makes habeas corpus all the more important, both now and in the future.