

## Habeas, Informational Asymmetries, and the War on Terror

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“You can’t go out, you’re arrested.”

“So it seems,” said K. “But what for?” he added.

“We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course. I am exceeding my instructions in speaking freely to you like this.”<sup>1</sup>

### INTRODUCTION

In Franz Kafka’s *The Trial*, the protagonist, Josef K., discovers one morning while waiting for his breakfast that he has been arrested. The mysterious men in black who come to Josef K.’s room inform him that he is under arrest, but refuse to tell him what crime he is accused of, what evidence there is against him, or even by what authority they are arresting him. Over the course of the novel he moves through a series of cryptic and often bizarre encounters with various representatives of the law and legal system, all of whom refuse to explain themselves to him.<sup>2</sup> This atmosphere of confusion, frustration, and helplessness resonates so powerfully that in everyday speech we now use the adjective “Kafkaesque” to describe a situation in which an individual is trapped in a seemingly capricious system that refuses to explain or justify itself, and over which he is powerless.<sup>3</sup>

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<sup>1</sup> FRANZ KAFKA, *THE TRIAL* 3 (Willa Muir & Edwin Muir trans., Schocken Books 1992) (1925).

<sup>2</sup> See generally *id.*

<sup>3</sup> See, e.g., FREDERICK ROBERT KARL, *FRANZ KAFKA, REPRESENTATIVE MAN* 758 (1991); NEIL KING & SARAH KING, *DICTIONARY OF LITERATURE IN ENGLISH* 85 (2002).

The central feature of the Kafkaesque scenario—being trapped by an opaque authority that reveals no information—is an exaggerated version of a situation familiar to many criminal defense practitioners, in which the information asymmetry between the government and the defendant is large, and defense counsel frequently spends considerable effort trying to extract information about the charges and the evidence from the government.<sup>4</sup> In fact, a considerable amount of modern criminal procedure is concerned with regulating and mandating the systematic disclosure of important information to the defendant so that he can contest the efforts to deprive him of his liberty.<sup>5</sup>

The government frequently detains people outside of the criminal law system, however. In those scenarios the rules of criminal procedure do not apply,<sup>6</sup> but the informational asymmetries between captor and captive remain. In non-criminal contexts, such as immigration or national security detention, the availability of the writ of habeas corpus has become an increasingly important tool for contest-

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<sup>4</sup> See, e.g., Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 484–88 (2009) (offering critical review of prosecutors' disclosure obligations); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 541–45 (2006) (recounting story of likely innocent robbery suspect who was convicted because failures of timely disclosure made alibi verification impossible); H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent—Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1092–93 (1991) (criticizing weak criminal discovery and likening defendants' situation to the one described in Kafka's work); see also Barry Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 KY. L.J. 58, 58–59 (1973) (reviewing Supreme Court decisions and arguing that Due Process requires expanded discovery in criminal cases).

<sup>5</sup> For example, absent certain circumstances, before a person can be arrested a court must issue an arrest warrant that requires a showing of probable cause. FED. R. CRIM. P. 4. Once a defendant is arrested, the government must satisfy its probable cause burden within a specific length of time, FED. R. CRIM. P. 5.1, 18 U.S.C. § 3060 (2006), and the government must return an indictment within a specified amount of time, 18 U.S.C. § 3161 (2006). Moreover, the government must make timely disclosure of exculpatory material to the defense. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (“[T]he suppression . . . of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”); see also *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (requiring prosecutors to disclose to the defense information about any deals they may have made with witnesses against the defendant).

<sup>6</sup> See, e.g., FED. R. CRIM. P. 1 (“These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.”).

ing an individual's detention and for compelling the government to articulate the basis for the detention.<sup>7</sup>

Habeas is primarily familiar to most American lawyers and legal scholars as a mechanism of collateral review of the constitutional sufficiency of a criminal conviction, and over the years an elaborate set of rules and doctrines has evolved around this very common practice.<sup>8</sup> But there is an older and more traditional deployment of the writ available, which can be used to challenge executive detention in the non-criminal context.<sup>9</sup> It is to this more general form of habeas that this Article is directed.

Habeas corpus is often viewed as intended to protect an individual's rights against arbitrary deprivations of liberty.<sup>10</sup> It has also frequently been understood in structural terms—for example, as an important element of separation of powers doctrine, as a judicial check on the executive and legislative branches,<sup>11</sup> or as an important means of enforcing rule of law values.<sup>12</sup>

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<sup>7</sup> See, e.g., Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 463–68 (2005) (reviewing the importance of habeas litigation in immigration law); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1004–20 (1998) (surveying the historical importance of habeas corpus for immigration law); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2524 (1998).

<sup>8</sup> See generally 28 U.S.C. §§ 2254, 2255 (2006); CHARLES DOYLE, CONG. RESEARCH SERV., RL 33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW (2006).

<sup>9</sup> See 28 U.S.C. § 2241 (2006); Motomura, *supra* note 7, at 463–68.

<sup>10</sup> See, e.g., Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 998–99 & n.23 (1985) (citing PAUL BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1477 (2d ed. 1973)) (characterizing the liberty-protecting rationale for habeas corpus as “conventional thinking”).

<sup>11</sup> See, e.g., Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2141–50 (2009) [hereinafter Vladeck, *Quiet Theory*] (arguing that *Boumediene* is best understood as a case regarding the importance of habeas and the Suspension Clause for separation of powers); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 956–62 (2007) (interpreting the *Hamdan* decision as affirming separation of powers values). For a skeptical view of habeas as a mechanism for separation of powers values, see Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2039 (2009) (“[I]t is Kafkaesque for the majority to invoke ‘separation of powers’ as a justification for dismantling two bulwarks of that doctrine, congressional control over federal jurisdiction and the political question doctrine.”).

<sup>12</sup> See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–50 (2000) (arguing that landmark Supreme Court habeas cases involving the review of criminal convictions of African American defendants in southern state courts can be understood as enforcing national rule of law norms on recalcitrant southern courts); see also David J. Garrow, *Bad Behavior Makes Big Law:*

Without taking anything away from these viewpoints, this Article offers another lens through which to view habeas corpus, suggesting that habeas operates to address the informational asymmetries described above. Our structural analysis understands habeas corpus as an “information-forcing” procedural mechanism, a concept that we borrow from contract theory.

In this Article, we will provide an overview of what we mean by “information forcing” and show how it applies in the habeas context. We will then set forth some of the institutional incentives that a robust information-forcing understanding of habeas corpus would provide to different institutional actors. We will also offer an explanation of how the information-forcing paradigm can help explain existing doctrine and offer some normative observations about how cases should be resolved in the future.

The Article proceeds in four parts. Part I explains the concept of information-forcing penalty default rules, which developed originally in private law scholarship, and explains how this idea can be helpful to public law scholars as well. It then explains how the concept can apply in the context of habeas corpus. Part II surveys the history of habeas corpus jurisprudence in England and America to demonstrate that habeas, as it has been understood over time, has always operated in an information-forcing manner. Part III discusses how a rigorous commitment to allowing habeas corpus to mitigate the informational asymmetries enjoyed by the executive would create positive incentives for each of the institutional actors relevant to controversies about executive detention policy—the detained individuals, the legislature, the judiciary, and the public itself. Finally, Part IV analyzes the development of habeas corpus jurisprudence in connection with the “War on Terror” to demonstrate how this paradigm can be used to illuminate existing doctrine and offers normative guidance to the future development of the law.

## I. INFORMATION FORCING

In this Part, we offer a background and critical history of the concept of information-forcing procedural devices. We begin by briefly explaining what an information-forcing device is, then outline the concept’s origins in contract theory. We then trace how scholars in disparate areas have adopted the idea and explain how it has developed beyond its original context as it has expanded.

*A. Default Rules and Information-Forcing Devices in Contract Theory*

Private law scholars have frequently analyzed the problem of information asymmetries in the context of contract theory. Contract scholars have developed a theory of “penalty default rules,” which predicts that courts will redress inefficiencies and unfairness that might result from asymmetric information by establishing “penalty default rules.” These default rules penalize the party with the superior information if it fails to come forward and affirmatively contract around the harsh default, in the process revealing the information that it possesses.

The term “information-forcing” is especially associated with the work of Ian Ayres and his collaborators, and with their studies of the role of default rules in structuring private ordering via contract bargaining.<sup>13</sup> In its simplest form, Ayres’s theory of the importance of default rules derives from the observation that all contract bargaining occurs against the backdrop of the default rules that apply absent a specific bargain to the contrary; the scholarship analyzes the role that these default rules play in structuring how bargaining occurs.<sup>14</sup>

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<sup>13</sup> The leading article that inaugurated the discussion of penalty defaults in contract theory is Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*]. See generally Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589 (2006) (answering critics); Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999) (providing a mathematical model to predict when a penalty—or minoritarian—default rule will be more efficient than a majoritarian one). The literature on default rules in contract theory is extensive. For an overview, see Richard Craswell, *Contract Law: General Theories*, in 3 THE ENCYCLOPEDIA OF LAW & ECONOMICS § 4000, at 5–9 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). For further discussion, see Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis for Contract*, 89 YALE L.J. 1261, 1300 (1980) (arguing that the *Hadley* rule—discussed *infra* notes 21–26 and accompanying text—can increase efficiency by stimulating the provision of information between bargainers); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 609–11 (1990) (discussing the problem of unanticipated costs arising from breach of contract and noting that courts typically will not expand a contract to provide for them where the parties have not bargained for a protection against them). For a critical view of penalty default rule thinking, see Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 565–72 (2006) (arguing that, as an empirical matter, none of the rules held up as examples of penalty defaults actually were penalty defaults); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993) (“[Default rule] scholarship is illuminating but less helpful than it could be . . . [because] there are several types of default rules but the literature does not distinguish adequately among them.”).

<sup>14</sup> Ayres & Gertner, *Filling Gaps*, *supra* note 13, at 89–95.

One form of default rule that Ayres highlights is what he refers to as a “penalty default.”<sup>15</sup> A penalty default rule is a default rule that applies a particularly harsh outcome on one or both parties if they do not contract around it.<sup>16</sup> An example from Ayres’s early work is the typical default rules that govern what happens in a real estate transaction if a buyer breaches a contract to buy a house and therefore forfeits an “earnest money” deposit.<sup>17</sup> If the contract between the seller and the seller’s real estate agent is silent as to how to allocate the deposit, then the entire deposit belongs to the seller, and the broker gets nothing.<sup>18</sup> Ayres observed that this default rule creates an incentive for the broker, who is presumably the party with greater knowledge and expertise in real estate transactions, to raise the issue affirmatively and specifically contract for the disposition of any forfeited proceeds.<sup>19</sup> In Ayres’s terminology, it operates as a “penalty” to the broker—who otherwise benefits from an information asymmetry—if he or she does not take steps to contract around the penalty default.<sup>20</sup>

The classic example of a penalty default rule is found in the well-known case of *Hadley v. Baxendale*.<sup>21</sup> In *Hadley*, a miller contracted with a freight carrier for the carrier to transport a crankshaft to the mill.<sup>22</sup> The contract was silent as to which party bore the risk of any delays in the shipment. When the shipment was delayed by a considerable period of time, the mill had to shut down, and the miller suffered consequential damages in the form of lost profits.<sup>23</sup> The miller sued the carrier to recover the lost profits, and the court denied the claim.<sup>24</sup> The court held that in the absence of any express allocation of the risk of delay, the miller could not recover, reasoning that the miller knew that time was of the essence and that he would be economically injured by any delay, yet he failed to contract for any penalty for failure to make a timely delivery.<sup>25</sup> Because (1) the miller knew that he faced losses for delay, (2) the carrier did not know about the

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<sup>15</sup> *Id.* at 95–107.

<sup>16</sup> *Id.* at 97–98.

<sup>17</sup> *Id.* at 98–99.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Ayres & Gertner, *Filling Gaps*, *supra* note 13, at 99.

<sup>21</sup> (1854) 156 Eng. Rep. 145 (Ex.).

<sup>22</sup> *Id.* at 146.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 149.

Miller's risk, and (3) the Miller did not act to protect his interests, the Miller could not recover.<sup>26</sup> In other words, the court imposed a default rule that will operate as a penalty to the customer unless he affirmatively contracts around it.<sup>27</sup>

Ayres interprets leading decisions like *Hadley* as showing that, in Anglo-American contract law, common-law courts often develop penalty default rules that impose harsh consequences on parties that possess information not easily available to the counter-party.<sup>28</sup> Accordingly, the information-advantaged party has an incentive to avoid the penalty by contracting around it; this avoidance has the effect, however, of forcing that party to disclose the information to which only it has access.

#### B. Information-Forcing Procedures in a Wider Context

The debate over the idea of penalty default rules engendered within contract scholarship has led scholars in other fields to ask whether this concept might illuminate issues beyond contract law.<sup>29</sup> As a result, the idea has traveled far beyond the realm of contract into other areas of private law and increasingly into public law scholarship as well.

One feature of this follow-on scholarship in other fields is that the application of the "information-forcing" concept has been more general and has not tracked the contract-based origins of the idea. For example, corporate law scholars Scott Baker, Stephen Choi, and Mitu Gulati reached for the idea of an information-forcing procedural structure in their essay on the "tournament model" in law firm evaluation and promotion decisions.<sup>30</sup> As Baker, Choi, and Gulati explain, although the much-despised focus on billable hours seemingly built into the path to partnership in most large corporate law

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<sup>26</sup> *Hadley*, 156 Eng. Rep. at 151–52.

<sup>27</sup> See generally *id.*

<sup>28</sup> Ayres & Gertner, *Filling Gaps*, *supra* note 13, at 101–02.

<sup>29</sup> See, e.g., *infra* notes 31–42 and accompanying text.

<sup>30</sup> See generally Scott Baker et al., *The Rat Race as an Information-Forcing Device*, 81 IND. L.J. 53 (2006). For more on the tournament model of law firm structure, see generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

firms has been criticized as harmful to both associates and law firms,<sup>31</sup> it likely persists because the stressful situations that the tournament structure creates operate to force young lawyers to reveal certain important facts that allow measurement of intangible metrics—including judgment, internal motivation, and the ability to work under pressure without alienating staff and colleagues—that are otherwise difficult to measure.<sup>32</sup> In this account, information forcing has less to do with incentives to disclose information by contracting around defaults and more with structural features of institutions that work to compel disclosure.<sup>33</sup>

This less-formalized conception of information forcing particularly lends itself to the analysis of public law issues, where the government will frequently be one “party” to a relationship and will generally not be a negotiating partner. For example, in a highly original article, Elizabeth Emens analyzes the ways in which polyamorous persons—individuals who are drawn to romantic or family relationships that involve three or more people rather than the more traditional pairs—must arrange families and intimate lives against the backdrop of state family law.<sup>34</sup> Emens argues that these state laws, which tend to presume monogamous relationships, are best understood as information-forcing default rules.<sup>35</sup> In her analysis, the law’s default to monogamy should serve primarily as an explicit backdrop against which those persons who wish to make different arrangements for their family life could contract with each other for different obligations and duties.<sup>36</sup>

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<sup>31</sup> Baker et al., *supra* note 30, at 56; *see, e.g.*, Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 292–93 (2000) (detailing the way that pressure to bill hours harms young lawyers and creates risks for law firms).

<sup>32</sup> Baker et al., *supra* note 30, at 56–60.

<sup>33</sup> Choi and Gulati elsewhere similarly argue that public ordinal rankings systems, for all of their flaws, serve an information-forcing role because they force institutions to make public—in an attempt to influence or mitigate ratings’ performance—information that would otherwise remain internal. *See* Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1363 (2009).

<sup>34</sup> Elizabeth N. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004); *see also* Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779 (2006) (applying penalty default rule concepts to family law).

<sup>35</sup> Emens, *supra* note 34, at 285–86.

<sup>36</sup> *Id.* at 371–75. For example, Emens suggests that where legal rules make monogamy the default option, persons who wish to be in non-monogamous relationships must come forward early in the relationship and ask for an explicit agreement to the contrary, or else face the “penalty” of being held to the default standard. *Id.*

The study that is most enabling of our analysis here is John Ferejohn and Barry Friedman's contribution to a symposium at the Florida State University College of Law on "Default Rules in Public and Private Law."<sup>37</sup> In their article, Ferejohn and Friedman explore the theoretical implications of applying default rule thinking in the domain of constitutional law, noting the conceptual challenges to such an approach, but also arguing that "default rules are pervasive and likely inevitable in constitutional law."<sup>38</sup> They lay out the different forms that default rules may take in constitutional law and argue that penalty defaults operate in this area primarily in the form of judicially enforced rules that require the government to disclose information or face an undesirable outcome.<sup>39</sup> For example, they point to the probable cause requirement in criminal law, which obligates the prosecution to reveal facts about its case or face dismissal, or the criminal discovery obligations announced in the *Brady* decision.<sup>40</sup>

Ferejohn and Friedman view habeas corpus through the lens of penalty default, writing that in instances when the government fails to disclose the reasons for detention, "the penalty—release of the prisoner—is sufficiently harsh that the executive is forced to reveal any information it has justifying detention."<sup>41</sup>

### C. *Information-Forcing Habeas Corpus*

This Article follows Ferejohn and Friedman in viewing habeas corpus as operating structurally as an information-forcing penalty default. To be sure, for the petitioner the ultimate goal is release from detention. As a structural matter, however, the way habeas traditionally operates is as a demand, enforceable by the judicial authority, that the sovereign come forward and justify the detention of the prisoner.<sup>42</sup> Although very often the sovereign will carry that burden, the threat of an order of release (or at least of a showdown with the judiciary that may expose the sovereign as lawless) creates a powerful in-

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She further suggests that a legal rule that sets the opposite default might be even more productive of candid discussions about what rules the parties in the relationship truly want. *Id.* at 373–74.

<sup>37</sup> John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825 (2006).

<sup>38</sup> *Id.* at 827.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 846–47 (discussing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

<sup>41</sup> *Id.* at 846.

<sup>42</sup> See 28 U.S.C. § 2243 (2006).

centive for the sovereign to make some response.<sup>43</sup> If arbitrary deprivations of liberty are the core injury that habeas has evolved to protect, the process for compelling the state to justify its detention, even more than release, is at the core of how habeas protects liberty.<sup>44</sup> Our claim is that courts, when faced with a petition for habeas corpus that falls outside of the codified systems of collateral review of state court convictions, should be guided by the core value of information disclosure. As we discuss later, this principle has unfortunately not always been followed.

## II. HABEAS CORPUS AND ASCERTAINING THE “CAUSE” OF THE DETENTION

In Part I we set forth what we hope is a conceptually appealing account of how habeas corpus functions in our constitutional system. In this Part, we try to show that this account is consistent with, and explains, the actual historical practice of habeas corpus in Anglo-American law. Much of the history of the writ has been concerned with “information forcing”—that is, with requiring the jailer to articulate publicly the *reasons* for the arrest and detention of a prisoner.<sup>45</sup> Indeed, the focus of the courts has historically been more about devising means to learn about the circumstances of a prisoner’s detention than about protecting the prisoner’s “rights” *per se*.<sup>46</sup> In this Part,

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<sup>43</sup> See Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010).

<sup>44</sup> Resnik makes a similar point in a long essay that has been influential on our thinking about these matters. See *id.* at 667–69. “For hundreds of years, habeas corpus has authorized an individual to require an accounting by the government in public.” *Id.* at 668.

<sup>45</sup> See generally Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 971 (2009).

<sup>46</sup> See, e.g., PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 14 (2010) (“[H]abeas corpus was fundamentally an instrument of judicial power derived from the king’s prerogative, a power more concerned with the wrongs of jailers than with the rights of prisoners.”); R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 2 (1976) (“The words ‘habeas corpus’ at this early stage [from medieval times through the thirteenth century] were not connected with the idea of liberty, and the process involved an element of the concept of due process of law only in so far as it mirrored the refusal of the courts to decide a matter without having the defendant present.”); Falkoff, *supra* note 45, at 966 (“Habeas corpus . . . has thus historically not been a substantive ‘right’ that someone possesses so much as it has been an evolving set of procedures through which the right to be free from illegal detention may be vindicated.”); cf. Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 851 (2010) (arguing that the extraterritorial reach of the Suspension Clause is best determined by looking to the limited powers granted to government by the Constitution rather than by trying to ascertain what “rights” a petitioner might possess).

we briefly review the history of the development of the writ's "return" requirement, which forces the jailer to explain to the courts the cause of the prisoner's detention.

Magna Carta established in the early thirteenth century that an English subject could be imprisoned only in accord with the "law of the land,"<sup>47</sup> but it took centuries for the courts to devise an effective set of procedures for determining whether a detention was or was not legal.<sup>48</sup> By the middle of the fourteenth century, the courts had fashioned a writ called *habeas corpus cum causa*, which required the jailer both to produce in court the body of the prisoner and, for the first time, to explain the reason for the detention.<sup>49</sup> This power to force the jailer to articulate the cause of the detention provided the courts with a potentially powerful tool for overseeing the authority of state actors to infringe on the liberty of an English subject.

At first, however, the courts (including the common law courts, Chancery, the ecclesiastical courts, and Admiralty) exercised this power primarily to move cases from one court to another in endless battles over jurisdiction.<sup>50</sup> It was not until the sixteenth century that the courts began using the *cum causa* writ in efforts to protect their jurisdiction from infringement by the executive branch—and in particular, the King's Privy Council—as well.<sup>51</sup> Indeed, over the course of the sixteenth century, the King's Bench developed a new form of the writ, *habeas corpus ad subjiciendum*, which was designed in particular to protect subjects against deprivations of liberty by officers of the state and the Privy Council by requiring them to explain to the courts the legal cause for their detention orders.<sup>52</sup>

An assembly of judges resolved in 1592 that it was not enough for a jailer to tell the court that a detention was justified simply because a single privy councilor had ordered it.<sup>53</sup> Instead, the writ of habeas corpus was to be answered, or "returned," with the specifics of the reasons for the detention, so that the court could determine its

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<sup>47</sup> Magna Carta, c. 39 (J.C. Holt trans., Cambridge Univ. Press 1965) (1215) ("[N]o free man shall be seized or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.").

<sup>48</sup> See generally Falkoff, *supra* note 45, at 966–69.

<sup>49</sup> *Id.* at 967 & n.31.

<sup>50</sup> See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 33–40 (1980) (describing the jurisdictional battles); SHARPE, *supra* note 46, at 4–7 (same).

<sup>51</sup> See DUKER, *supra* note 50, at 41.

<sup>52</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 126–27 (2d ed. 1979).

<sup>53</sup> See Falkoff, *supra* note 45, at 969.

legality.<sup>54</sup> Generally speaking, therefore, by the end of the sixteenth century, the English courts possessed a tool for requiring the executive to show cause to the court for any detention of an English subject.<sup>55</sup>

In practice, however, this power to force the executive to explain its reasons for a particular detention often proved toothless. The same assembly of judges in 1592 had stated in their resolution that “general” returns—those which did not specify the particulars of a detention—*were* acceptable when they stated that the detention had been authorized by the entire Privy Council,<sup>56</sup> or by the monarch himself or herself.<sup>57</sup> In part, this was justified by the need for the executive to avoid the “great inconvenience” of having, for example, to reveal state secrets.<sup>58</sup> Through the early seventeenth century, therefore, the state could detain subjects without giving the courts an accounting of the legal cause of the detention, at least when acting through the King or Queen, or through the entire Privy Council.

Unsurprisingly, this power was politically controversial. It led Parliament to twice attempt to enhance by statute the habeas powers of the courts, in 1593 and 1621.<sup>59</sup> These bills, which would have required the cause of *all* detentions to be explained to the courts, did not pass, setting the stage for the famous *Darnel’s Case* (also known as *The Five Knights’ Case*) in 1627.<sup>60</sup>

*Darnel’s Case* involved a habeas corpus petition filed by five knights who had been imprisoned for refusing to make a loan that had been ordered by Charles I without Parliament’s sanction.<sup>61</sup> In response to the writ, the attorney general stated no more than that the knights’ detention was legal because the King had ordered it (and that it was therefore, by definition, in accord with the “law of the land”).<sup>62</sup> Following precedent, the King’s Bench accepted this gener-

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<sup>54</sup> *Id.*

<sup>55</sup> See Resolution, 1 And. 297 (1592).

<sup>56</sup> Ruswell’s Case, (1615) 1 Rolle 192, 192 (K.B.); Salkingstowe’s Case, (1615) 1 Rolle 219, 219 (K.B.); Les Bruer’s Case, (1614) 1 Rolle 134, 134 (K.B.); see also HALLIDAY, *supra* note 46, at 26.

<sup>57</sup> See Addis’s Case, (1610) Cro. Jac. 219 (K.B.) (addressing challenge to adequacy of return that stated only that prisoner was being held “for certain matters concerning the King”).

<sup>58</sup> See HALLIDAY, *supra* note 46, at 154.

<sup>59</sup> See SHARPE, *supra* note 46, at 9 (discussing defeat of bills in 1593 and 1621).

<sup>60</sup> (1627) 3 How. St. Tr. 1 (K.B.).

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.* at 38-41.

al or no-cause “return” to the writ as adequate legal justification for the detention and refused to order the release of the petitioners.<sup>63</sup>

This decision was controversial. Hard on the heels of *Darnel’s Case*, Parliament complained in the Petition of Right in 1627 that Charles I had imprisoned subjects “without any cause showed,” even after a habeas petition had required a return to the writ.<sup>64</sup> The Petition of Right stated that “no freeman shall be imprisoned or detained contrary to the law of the land,”<sup>65</sup> which, of course, begs the question of whether or not an order of detention made by the King or his full Privy Council *is* in accord with the law of the land. Subsequent to passage of the Petition of Right, however, Charles I did not change practice with respect to issuing general returns to the habeas writ because he denied that the petition had the force of law.<sup>66</sup>

Parliament soon acted again, passing the Habeas Corpus Act of 1641.<sup>67</sup> This statute specifically provided that anyone imprisoned by a privy councilor, *or* by the King or the entire Privy Council, could ask the courts for a writ of habeas corpus, and that the jailer supply the courts with the “true cause” of—or the particular justification for—the detention.<sup>68</sup> The act was not effective in practice, however, for several reasons. It was unclear, for example, whether the writ could be issued during the vacation time of the courts, which led to lengthy detentions.<sup>69</sup> In addition, in order to avoid judicial oversight of de-

<sup>63</sup> *Id.* at 31.

<sup>64</sup> The Petition of Right stated that when subjects had been brought before [the] justices by [his] Majesty’s writs of habeas corpus, . . . [and] their keepers [were] commanded to certify the causes of their detainer, no cause was certified, but that they were detained by [his] Majesty’s special command, signified by the lords of your Privy Council, and yet were returned back to several prisoners, without being charged with anything to which they might make answer according to the law.

Petition of Right, 1627, 3 Car. 1, c. 1 (Eng.). Paul D. Halliday has recently argued that the importance of Parliament’s Petition of Right has been exaggerated because the courts had already ended Privy Council no-cause returns. HALLIDAY, *supra* note 46, at 139. Halliday notes that writs were issued for no-cause returns about thirty percent of the time in the seventeenth century, and more than half of the writs that were issued occurred after 1628. *Id.* at 154.

<sup>65</sup> Petition of Right, 1627, 3 Car. 1, c. 1 (Eng.).

<sup>66</sup> See *Six Members’ Case*, (1629) 3 St. Tr. 235, 240 (K.B.). Nonetheless, as Paul D. Halliday has argued, the courts still looked “behind” the return to find facts, and thus issued the writ based upon alternative methods of fact-finding. HALLIDAY, *supra* note 46, at 223.

<sup>67</sup> 16 Car. 1, c. 10 (Eng.).

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 81 (1644) (suggesting that neither the King’s Bench nor Common Pleas courts could issue habeas writs during vacation). *But see* HALLIDAY, *supra* note 46, at

tentions, jailers transported prisoners to Scotland or other areas where the writ was hypothesized not to reach.<sup>70</sup> The effect was that a subject might be detained without any public awareness of his detention.<sup>71</sup>

These and other “pitiful evasions”<sup>72</sup> led Parliament to pass the heralded Habeas Corpus Act of 1679, which clarified from which courts the writ could issue, when the writ was available, and how quickly the jailer must show cause to the court for the legality of the detention.<sup>73</sup> Among the many detailed provisions of the act was the requirement that the court, upon receiving an inadequate “return” to the writ, release the prisoner from detention.<sup>74</sup> These were the protections that were enshrined in the Suspension Clause of the U.S. Constitution.<sup>75</sup>

Habeas has, therefore, historically been about forcing the executive to bring information about detention decisions into the public sphere, even when the executive does not want to do so—or else suffer the penalty of a judicial order releasing the prisoner from custody.

### III. INFORMATION FORCING AND INSTITUTIONAL INCENTIVES

The history set forth in Part II correlates with our further suggestion that habeas and its procedures should be understood as operating to flush information out of the sole possession of the executive or

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55–58 (arguing that it is a “longstanding misapprehension” that the courts could not do so).

<sup>70</sup> See, e.g., HALLIDAY, *supra* note 46, at 216 (noting that the “first experiments with sending prisoners to insular places in hopes of keeping them beyond the writ’s reach” took place during the Interregnum by the Council of State); see also SHARPE, *supra* note 46, at 17–18 (listing other abuses).

<sup>71</sup> As Blackstone suggested, “confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary Government.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136 (Neill H. Alford, Jr. et al. eds., The Legal Classics Library 1983) (1768); see also *id.* at 138 (“[Habeas is a] remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of Government. For it frequently happens in foreign countries . . . that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.”).

<sup>72</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (Neill H. Alford, Jr. et al. eds., The Legal Classics Library 1983) (1768).

<sup>73</sup> 310 Car. 2, c. 2 (Eng.).

<sup>74</sup> *Id.* ¶ 7.

<sup>75</sup> “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.” U.S. CONST. art. I, § 9, cl. 2.

military because enhancing the amount and quality of the information about particular detention decisions benefits the democratic process in a variety of ways. In this Part, we explain the incentives that various institutional actors would face if robust commitment to the information-forcing values that we advocate were consistently applied.

*The Detainees.* This group is the most obvious beneficiary of a strong information forcing system. In many contexts—certainly in criminal prosecutions, but also in many immigration proceedings as well—a person who is being detained will have been informed of the reason for his detention, and on what authority he is being detained, as part of the ordinary course of procedure.<sup>76</sup> As we explained above, however, as a normative matter a person being detained by the United States always has the right to be informed of this information, even absent a specific statutory scheme, if the writ is properly applied.<sup>77</sup>

As we have seen from the Guantánamo litigation, the detainee who seeks a writ of habeas corpus may well have little or no information about why he is being detained. As a result, even aside from whatever limits there may be on his access to court proceedings, the detainee might have little insight about how to explain to his jailer that his detention is unwarranted. Furthermore, although habeas is traditionally thought of as a mechanism to obtain the release of a prisoner, the Kafka example with which we began reminds us that detention without explanation or a meaningful opportunity to contest the detention is itself an injury. Even when a reviewing court determines that a person's detention is lawful—even when that court determines that it lacks authority to order the relief of release—it is still

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<sup>76</sup> Under the rubric of national security, successive administrations have increasingly attempted to keep information secret even in court proceedings involving deprivations of liberty, such as immigration detentions. A discussion of this practice is beyond the scope of this Article, but such secrecy obviously runs counter to the democracy and accountability-promoting effects we urge for habeas corpus. For more on secrecy in non-criminal detention proceedings, see, e.g., Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 129–35 (2006) (discussing the government's attempts to keep Guantánamo detention completely secret); Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 295–303 (2008) (providing an overview of the use of secrecy in immigration proceedings).

<sup>77</sup> See *supra* notes 52–75 and accompanying text (discussing the role of the return in habeas procedure).

meaningful relief to the prisoner to be informed of the basis of his detention.<sup>78</sup>

One especially striking example of this situation involved Abdulla Kamel al Kandari, a Kuwaiti who was taken into custody in Afghanistan and transferred to Guantánamo Bay in 2002.<sup>79</sup> As part of his interrogation, Kandari was asked about an alias purportedly found on a computer that was allegedly owned by a senior al Qaeda leader.<sup>80</sup> The government refused to tell him what the alias was, whose computer it was found on, or when the computer was seized.<sup>81</sup> In the face of this truly Kafkaesque situation, it was obviously impossible for the prisoner to explain the alleged alias, argue that it was not his, or point his interrogators towards another person whose alias it may have been.<sup>82</sup> Even if Kandari had in fact used an alias, he could not verify that this particular word or name was his actual alias. As the purported alias was one of the main pieces of evidence justifying his continued detention, he had no reasonable basis to argue for his release.

Although this example may be extreme, the so-called “War on Terror” detention policy of the Bush and Obama administrations offers a sad catalog of the breakdown of the disclosure regime we have come to expect in the types of domestic detention scenarios American lawyers are more used to seeing. The fact is that once courts are operating outside of the familiar and codified procedural systems with which they are acquainted, they are often reluctant to follow the traditional habeas requirement of the return. Furthermore, the fact that the executive branch officials are willing—if not eager—to forgo justifying detention, strongly reinforces the urgent necessity that information forcing be understood as a crucial function of habeas in our constitutional system.

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<sup>78</sup> For example, within international human rights law, Article 9(2) of the International Covenant on Civil and Political Rights recognizes the right of “[a]nyone who is arrested” to “be informed, at the time of arrest, of the reasons for his arrest and [to] be promptly informed of any charges against him.” G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>79</sup> Tom Lasseter, *Guantánamo Inmate Database: Abdulla Kamel al Kandari*, MCLATCHY NEWSPAPERS, <http://services.mcclatchyinteractive.com/detainees/20> (last visited Sep. 19, 2011).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Kandari was repatriated to Kuwait in the fall of 2006. Given that information-gathering is alleged to be one of the important functions of the Guantánamo system of detention, it is striking how this strong commitment to secrecy can undermine the intelligence-gathering function that supposedly authorizes the detention process in the first place.

*The Legislature.* The effects on the legislative branch of a rigorous information-forcing approach to habeas corpus are more complicated, because the legislature typically operates at some remove from the habeas process. We make two arguments regarding the legislature.

First, to the extent that Congress has authority over the statutory backdrop against which the executive branch's detention policy decisions play out—either by enacting new statutes or by declining to act to modify, rescind, or amend existing statutes—it obviously has the capacity to influence the range of possible actions available to the executive.<sup>83</sup> Courts in our system are often urged to defer judgments about difficult policy matters—especially the kind of national security, immigration, and law enforcement matters implicated in habeas decisions—to the politically accountable branches.<sup>84</sup> However, if the executive is permitted to detain people without disclosure, it is difficult for Congress to properly monitor the executive's exercise of its authorized powers, and difficult for the electorate to subject the legislature to political accountability. As public choice theory predicts,<sup>85</sup> Congress in fact often chooses to leave extensive discretion in deten-

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<sup>83</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. LAW 1, 8–9 (2003) (arguing that the legislative branch has often set the terms for the executive's exercise of seemingly unilateral powers); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2665–67 (2005) (applying administrative law principles to argue that the first question in judicial review of executive action is whether the legislative grant of authority also includes a delegation of interpretive authority as well).

<sup>84</sup> See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 654–63 (2000) (reviewing judicial deference to the executive branch in foreign affairs); Julian Ku & John C. Yoo, *Hamdan v. Rumsfeld: The Functional Case For Foreign Affairs Deference To The Executive Branch*, 23 CONST. COMMENT. 179, 199–205 (2006); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1193–1217 (2007) (calling for deference to executive interpretations of statutes relating to foreign affairs); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1206 n.19, 1211–12 (2002); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 590–600 (2006). *But see* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1422–33 (2009) (reviewing judicial deference to executive branch fact-finding and concluding that it is not warranted in many cases); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 402–08 (2006) (expressing skepticism about the extent of foreign affairs deference required).

<sup>85</sup> See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 55–62 (1982); Richard J. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 490–91 (1985).

tion decisions to the executive, thereby providing itself with a kind of plausible deniability about detention policy. The requirement of the return allows information to enter the public sphere and eventually allows the public to assess the prisoners' detention and determine whether the executive has been acting appropriately.<sup>86</sup> Robust information forcing, therefore, improves accountability, both electorally and between the political branches.

Second, we believe that the courts can properly effect a further desirable form of information forcing through the quintessentially judicial activity of statutory interpretation. Scholars of statutory interpretation have identified a specific type of information-forcing default rule known as a "preference-eliciting" rule, whereby an ambiguous statute is construed by the court in a manner that forces the legislature to articulate more clearly what rule it would like to see enforced.<sup>87</sup> According to this account, judicial canons of interpretations such as clear statement rules operate by establishing a default rule that the legislature may not have intended or desired, thereby leading the legislature to revisit the issue and enact a more specific and clear statute to accomplish its legislative goals.<sup>88</sup>

In the context of habeas corpus and executive detention, courts should employ clear statement or other preference-eliciting rules to construe statutes that derogate habeas rights narrowly, ensuring that only unambiguous pronouncements by Congress will restrict the

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<sup>86</sup> A discussion of the democracy and accountability enhancing aspects of information forcing habeas is beyond the scope of this Article, but we address it more specifically in a future article. We are grateful for Professor Jonathan Hafetz's informal reminder that, to the extent the executive can keep the contents of the return classified, the democracy-promoting aspects of habeas will be muted. We agree that classification inhibits this function (and would argue that is a reason courts should be reluctant to seal such materials), but we also contend that there is a benefit even in disclosure to the detainee or his counsel. Moreover, even in the Guantánamo litigation, with all of its restrictions, a substantial amount of information at odds with the official government narrative was able to make its way into the press. See MARK DENBEAUX ET AL., REPORT ON GUANTÁNAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), available at [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf); see also *infra* text accompanying notes 99–102 (discussing Mark Denbeaux's report).

<sup>87</sup> See Einer Elhague, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002).

<sup>88</sup> *Id.* at 2168–91. For more on clear statement rules, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

scope of habeas.<sup>89</sup> To take the example of the Guantánamo litigation, application of a preference-eliciting information-default rule helps explain the Supreme Court's decisions in *Rasul v. Bush* (construing 28 U.S.C. § 2241)<sup>90</sup> and *Hamdan v. Rumsfeld* (construing the Detainee Treatment Act (DTA)).<sup>91</sup> In both of these cases, the Court made clear to Congress, in essence, that if it wanted to strip the courts of jurisdiction over habeas matters then it must do so with clear statements.<sup>92</sup>

*The Public.* A rarely acknowledged beneficiary of habeas is the public itself. When the government acts in secret, there is no way for citizens to determine whether the President's detention decisions are in accord with the values or expectations of the national community. Secrecy keeps the public from exercising its franchise in an informed manner, forcing citizens to vote based on second-order decisions (about the refusal of the executive branch to reveal information), rather than on first-order decisions (about whether a particular detainee or class of detainees *should* have been arrested and imprisoned at all).

Consider some of the ways in which the Guantánamo habeas litigation has shaped the national debate about our detention policies. Prior to the Supreme Court's 2004 decision in *Rasul*—holding that the federal courts had statutory jurisdiction to hear habeas petitions filed by Guantánamo prisoners<sup>93</sup>—the American public knew almost nothing about the detainees at Guantánamo, aside from political pronouncements about their being among the “worst of the worst” and assurances—later proven false—that the prison housed men who were “picked up on the battlefield fighting American forces, trying to kill American forces.”<sup>94</sup> Neither lawyers nor the press were allowed

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<sup>89</sup> See *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2033 (2007); Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. DAVIS L. REV. 945, 967–68 (2010).

<sup>90</sup> 542 U.S. 466, 480–84 (2004).

<sup>91</sup> 548 U.S. 557, 572–84 (2006).

<sup>92</sup> See Curtis A. Bradley, *Clear Statement Rules and Executive War Powers*, 33 HARV. J.L. & PUB. POL'Y 139 (2010); Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059 (2009).

<sup>93</sup> *Rasul*, 542 U.S. at 484.

<sup>94</sup> Press Briefing, White House Press Sec'y Scott McClellan (June 21, 2005), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=66221#ixzz1OVyenpyK>. For a collection of similar statements, see Stuart Taylor, Jr., *Opening Argument—Falsehoods About Guantánamo*, NAT'L J. (Feb. 4, 2006), <http://www.nationaljournal.com/magazine/opening-argument-falsehoods-about-guantanamo-20060204?print=true>.

access to the prison. The only independent information the American public had about what was going on “inside the wire” or about who was being detained there came from released prisoners<sup>95</sup> and, in one instance, from a military linguist who had assisted with interrogations.<sup>96</sup> Although Guantánamo had been functioning as a “War on Terror” prison since January 2002, prior to the *Rasul* decision the military had not provided the public with any particularized justifications for the detention of any detainee. Indeed, it was not until spring 2006 that the public even learned the names of all of the men detained at the prison.<sup>97</sup>

By recognizing the detainees’ statutory right of habeas, however, the Supreme Court in *Rasul* forced the government to articulate—initially to the habeas lawyers and eventually to the public itself—the alleged factual and legal justifications for the detentions. In the fall of 2004, the government was forced to file factual returns justifying the detention of every prisoner who had filed a habeas petition in the federal courts.<sup>98</sup> The effect was several-fold.

First, the public learned for the first time that the government’s unsupported general allegations about the detainee population—that these were bomb makers and “facilitators of terror” who were picked up on the battlefield by U.S. troops<sup>99</sup>—was largely a fabrication. The

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<sup>95</sup> See, e.g., MOAZZAM BEGG, *ENEMY COMBATANT: MY IMPRISONMENT AT GUANTANAMO, BAGRAM, AND KANDAHAR* (2006).

<sup>96</sup> See ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER’S EYEWITNESS ACCOUNT OF LIFE AT GUANTÁNAMO* (2005).

<sup>97</sup> The Department of Defense released the names of the 558 detainees who had gone through the Combatant Status Review Tribunal (CSRT) process at Guantánamo on April 19, 2006. See Kathleen T. Rhem, *DoD Releases Names of 759 Current, Former Guantanamo Detainees*, AM. FORCES PRESS SERV. (May 1, 2006), <http://www.defenselink.mil/news/newsarticle.aspx?id=15754>. Officials released the complete list of names (including the other 201 detainees who had been transferred or released before going through the CSRT process) about one month later. See *List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 Through May 15, 2006*, MIAMI HERALD, [http://media.miamiherald.com/smedia/2008/05/23/21/noor.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2008/05/23/21/noor.source.prod_affiliate.56.pdf) (last visited Sep. 26, 2011).

<sup>98</sup> Although the government initially balked at filing factual returns, status hearings called by Senior Judge Joyce Hens Green led counsel for the government to agree to provide justifications for the detentions beginning in September 2004. See Coordination Order Setting Filing Schedule and Directing the Filing of Correspondence Previously Submitted to the Court at 5–6, *Abdah v. Bush*, 04-CV-1254 (D.D.C. Sept. 20, 2004) (order of Judge Joyce Hens Green).

<sup>99</sup> “The people that are there are people we picked up on the battlefield primarily in Afghanistan. They’re terrorists. They’re bomb-makers. They’re facilitators of terror. They’re members of al Qaeda and the Taliban.” Interview by Wolf Blitzer,

military's own documents, turned over to the detainees' lawyers as part of the factual returns, revealed that eighty-six percent of the prisoners had initially been taken into custody by Pakistani rather than American security forces, and that these captures had been made at the Afghanistan-Pakistan border rather than at anything resembling an actual battlefield.<sup>100</sup> The public also began to learn fantastical details about the detentions of particular detainees: one prisoner was being held as an accomplice in a suicide bombing, even though the alleged suicide bomber was alive and well in Germany.<sup>101</sup> Another prisoner was held on suspicion of being a bodyguard for Usama bin Laden, based almost entirely on statements made by another Guantánamo prisoner whom even the military considered an unreliable serial liar.<sup>102</sup>

Second, because the lawyers were eventually given access to the habeas petitioners at Guantánamo, the public also soon learned about the circumstances of the prisoners' detention, which indisputably involved torture and mistreatment. Prisoners described to their lawyers "short-shackling," sleep deprivation, subjection to uncomfortably hot and cold temperatures, routine beatings, interrogations at gunpoint, and religious humiliation.<sup>103</sup> In this regard, consider how much the public has learned about the detainees at Guantánamo

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CNN News Reporter, with Dick Cheney, Former Vice President, U.S. (June 23, 2005), available at <http://edition.cnn.com/2005/US/06/24/cheney/index.html>.

<sup>100</sup> See DENBEAUX ET AL., *supra* note 86, at 2.

<sup>101</sup> See Baher Azmy, *Epilogue* to MURAT KURNAZ, FIVE YEARS OF MY LIFE: AN INNOCENT MAN IN GUANTANAMO 240–46 (2008); Baher Azmy, *Executive Detention*, Boumediene, and the New Common Law of Habeas, 95 IOWA L. REV. 445, 447–48 (2010).

<sup>102</sup> See Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y. CITY L. REV. 393, 398–99 (2007) (discussing the case of Farouk Ali Ahmed); Corinne Hegland, *Guantánamo's Grip*, NAT'L J. (Feb. 3, 2006), <http://www3.nationaljournal.com/members/news/2006/02/0203nj1.htm> (same). Mr. Ahmed was released from Guantánamo in December 2009. *The Guantánamo Docket: Faruq Ali Ahmed*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/32-faruq-ali-ahmed> (last visited Sept. 26, 2011).

<sup>103</sup> See CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE, CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTÁNAMO BAY, CUBA 14–28 (2006), available at [http://ccrjustice.org/files/Report\\_ReportOnTorture.pdf](http://ccrjustice.org/files/Report_ReportOnTorture.pdf) (cataloging allegation of mistreatment reported by Guantánamo prisoners' lawyers). In the summer of 2005, *TIME* posted to the Internet a classified document logging seven-weeks' worth of interrogation sessions of prisoner Mohammed al-Qahtani, showing that he had been subjected to a host of humiliations (including invasion of his personal space by a female, water poured repeatedly over his head, photographs of 9/11 victims pinned to his clothes, and restricted access to a toilet) and life-threatening treatment (including interrogation for twenty hours a day for nearly the entire seven weeks, with a break allowed only for a brief period of hospitalization after his heart rate fell to thirty-five beats per minute). INTERROGATION LOG OF DETAINEE 063 92003), available at <http://www.time.com/time/2006/log/log.pdf>.

from their lawyers over the past seven years, including how they were captured and how they have been treated, in contrast with how little the public knows about the detainees at the U.S. prison in Bagram, Afghanistan, who likewise have sued for habeas relief but who, until now, have been unsuccessful in their attempts to force the military to file “returns” to the writ that would provide the factual basis for their detentions.<sup>104</sup>

Third, the public has also learned a great deal about the constitutional philosophy of the Bush and Obama administrations from the *Rasul* litigation itself and the legal positions subsequently taken by the administrations. The Bush administration, in defending the legal theory that the prisoners at Guantánamo were not entitled to habeas review in any court, was acting on a profoundly expansive understanding of the President’s war powers and of the relative unimportance of Congress in detention policy.<sup>105</sup> The Obama administration, notwithstanding the President’s executive order to close Guantánamo during his second day in office,<sup>106</sup> has unexpectedly revealed a similarly broad view of executive powers during wartime. Indeed, the same arguments propounded by the Bush administration for denying the effectiveness of the writ at Guantánamo have been made by the Obama administration with respect to the reach of the writ at Bagram.<sup>107</sup> The government’s litigation position in these cases thus reveals an indirect benefit to the public of the habeas litigation, akin to the “tournament effect” by which an observer can glean information about participants who are engaged in competition by observing not only *who* wins the game, but also by observing *how* the players play the game, including what rules they are willing to bend or break to win.<sup>108</sup> The public has learned from the Guantánamo and Bagram litigation

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<sup>104</sup> See Falkoff & Knowles, *supra* note 46, at 853. Along these lines, Amy Davidson has observed that “[i]f Guantánamo is, to quote the poetry of Donald Rumsfeld, a known known, Bagram is a known unknown.” Amy Davidson, *Close Read: What’s Going on at Bagram?*, NEW YORKER (Sep. 14, 2009), <http://www.newyorker.com/online/blogs/cloread/2009/09/close-read-whats-going-on-at-bagram.html>.

<sup>105</sup> See Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep’t of Def., *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>106</sup> Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

<sup>107</sup> See Falkoff & Knowles, *supra* note 46, at 866.

<sup>108</sup> See Baker et al., *supra* note 30, at 56.

the extent of the Bush and Obama administrations' expansive views of the powers of the executive vis-à-vis the other branches of government.

*The Courts.* Another institutional actor that benefits from the habeas process is the judiciary itself. Judges have an interest in promoting information-forcing rules because, at the most basic level, it is their obligation to police the lawfulness of detentions. They cannot perform this function if the executive does not provide legal or factual justification for the detentions. Of course, to some degree this observation smacks of circularity: judges have an interest in forcing the executive to turn over information about a habeas petitioner's detention because judges are tasked with enforcing habeas procedures, which historically require the executive to turn over information about the petitioner's detention.

There is, however, a normative point to be made here as well: by requiring the government to provide information about a detention on penalty of a court-ordered release of the petitioner, the judge will be able to make an informed decision about the appropriateness of the detention. Particularly in the wartime executive-detention context, the metes and bounds of the executive's detention authority are not historically clear. Where the rules for differentiating a constitutional from an unconstitutional detention are fluid and unstable, the judge's task in deciding on the legality of a detention is enhanced by default rules that promote the provision of more factual information. In short, judges' decision-making is enhanced by more expansive access to factual information about detentions.<sup>109</sup>

At a broader level, the information-forcing character of habeas enhances separation-of-powers values by limiting the power of the executive to act unilaterally, with no or only de minimis judicial oversight.<sup>110</sup> Robust habeas procedures preserve the ability of the courts to check the political branches and, as such, are as much about protecting the role of the courts in our system of checks and balances as about protecting the "rights" of detainees.<sup>111</sup>

*The Executive.* A final institutional actor that benefits from the information-forcing function of habeas is, counter-intuitively, the executive itself. It would seem that the President and the military have

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<sup>109</sup> Cf. Ayres & Gertner, *Filling Gaps*, *supra* note 13, at 91 ("[Penalty defaults] encourage the parties to reveal information to each other or to third parties (especially the courts).").

<sup>110</sup> See Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 302-03 (2009).

<sup>111</sup> See Vladeck, *Quiet Theory*, *supra* note 11, at 2011.

every incentive to prevent the release of information to the courts, the detainees, the detainees' lawyers, and the public, since being forced to divulge information has the potential only to change the status quo in a manner that the executive does not desire—that is, to lead to the court-ordered release of a petitioner, or perhaps to political pressure to release a petitioner that the executive wants to continue to detain. Nonetheless, even the executive may benefit from robust information-forcing default rules in habeas.

As the Guantánamo litigation has revealed, sometimes the executive branch does not itself know why it is detaining a particular prisoner. In the Afghanistan conflict, most of the prisoners who ended up at Guantánamo were taken into custody not by U.S. soldiers, but by Pakistani security forces, who subsequently handed the detainees over to the Americans.<sup>112</sup> The U.S. military chose not to hold status hearings about the enemy-combatant status of these detainees, as is required under Army Regulation 190-8<sup>113</sup> and Article 5 of the Geneva Conventions.<sup>114</sup> Apparently applying Vice President Cheney's "one-percent doctrine" to these captives,<sup>115</sup> the Bush administration saw no downside to erring on the side of "caution" by detaining persons handed over to them, even if the evidence of involvement in terrorism or past combatancy was lacking.

Partly as a result of the lack of information about the detainees, the Bush administration eventually released—without court order—500 of the 775-odd prisoners held at Guantánamo.<sup>116</sup> A robust habeas process would have required the executive to gather information for itself about these prisoners earlier. Doing so would, of course, have spared perhaps hundreds of prisoners' the deprivation of their liberty for literally years. But it also would have redounded to the benefit of

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<sup>112</sup> See DENBEAUX ET AL., *supra* note 86, at 2 (reviewing government documents and finding that only five percent of detainees were captured by U.S. troops, and that eighty-six percent were picked up by Pakistani or Northern Alliances forces and handed over to U.S. custody).

<sup>113</sup> U.S. Dep't of the Army, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, *available at* [http://armypubs.army.mil/epubs/pdf/R190\\_8.PDF](http://armypubs.army.mil/epubs/pdf/R190_8.PDF).

<sup>114</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>115</sup> See RON SUSKIND, *THE ONE-PERCENT DOCTRINE* 62 (2006). "If there's a 1% chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." *Id.* (describing Vice President Cheney's approach to War on Terror issues).

<sup>116</sup> See Scott Shane & Mark Landler, *Obama, in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A19 ("About 500 detainees were released by the Bush administration.").

the executive in several ways. First, investigative and translator resources that were devoted to interrogating prisoners who were not involved in terrorism or combatancy (or whose involvement was de minimis) could have been redeployed to useful endeavors rather than in a futile hunt for intelligence that the prisoners did not possess. Second, prisoners who in fact *might* have been involved in belligerency but who were released as political accommodations to allies (like the release of almost all Afghans who were detained at Guantánamo) would more likely have been detained further rather than released, and their acts of recidivism might not have taken place.<sup>117</sup> Third, the legitimacy of the Bush administration's Guantánamo project would have been enhanced if the public learned that, in fact, Guantánamo was only housing combatants and terrorists, rather than, as in fact, housing a small number of combatants and apparently large numbers of innocents and "small fry" foot-soldiers.<sup>118</sup>

It is no mere hypothesis that the Bush administration did not know why most of the Guantánamo prisoners were there. When the Obama administration took over, it was faced with a marked deficit of information about the facts underlying the detentions of the remaining 240 Guantánamo prisoners.<sup>119</sup> As a result, one of the new administration's first acts was to form an executive task force to figure out

<sup>117</sup> The Pentagon has occasionally made public its estimates of the amount of "recidivism" among former Guantanamo prisoners. See, e.g., OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA, (2010), available at [http://www.dni.gov/electronic\\_reading\\_room/120710\\_Summary\\_of\\_the\\_Reengagement\\_of\\_Detainees\\_Formerly\\_Held\\_at\\_Guantanamo\\_Bay\\_Cuba.pdf](http://www.dni.gov/electronic_reading_room/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf) (asserting that, as of October, 1, 2010, fully 150 of the 598 prisoners who had been released from Guantanamo were confirmed or suspected of "reengaging in terrorist or insurgent activities after transfer"). Researchers for the New America Foundation, however, independently concluded that, as of January 2011, there was evidence that only forty-nine of the 600 released Guantanamo prisoners either engaged with or are suspected to have engaged with insurgent groups after transfer. See PETER BERGEN ET AL., NEW AM. FOUND., GUANTANAMO: WHO REALLY RETURNED TO THE BATTLEFIELD, (2011), available at [http://www.foreignpolicy.com/files/fp\\_uploaded\\_documents/110112\\_RecidivismAppendix2.pdf](http://www.foreignpolicy.com/files/fp_uploaded_documents/110112_RecidivismAppendix2.pdf).

<sup>118</sup> "Of the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren't fighting. They were running." Mark Huband, *US Officer Predicts Guantánamo Releases*, FIN. TIMES, Oct. 4, 2004, at 12, available at <http://www.ft.com/cms/s/0/192851d2-163b-11d9-b835-00000e2511c8.html#axzz1VEcSGso7> (statement of Brigadier General Martin Lucetti).

<sup>119</sup> U.S. DEP'T OF JUSTICE, FINAL REPORT: GUANTÁNAMO REVIEW TASK FORCE ii (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

who these prisoners were and why they were in Guantánamo.<sup>120</sup> The result of this review was a determination that 126 prisoners should be transferred, 30 additional Yemeni prisoners should be designated for “conditional” repatriation depending on the security conditions in Yemen, 44 prisoners should be referred for prosecution, and 48 prisoners should be detained because they were “dangerous,” even though there was insufficient evidence to prosecute them.<sup>121</sup>

#### IV. WAR ON TERROR HABEAS ISSUES THROUGH THE LENS OF INFORMATION FORCING

Our account of the information-forcing function of habeas corpus provides some explanatory value for the handful of Supreme Court “War on Terror” opinions that have been issued since *Rasul* in 2004. But more importantly, it offers a useful paradigm for thinking about some of the many unresolved executive-detention habeas issues that remain pending before the lower federal courts and that may, or may not, be resolved ultimately by the Supreme Court. Among those issues are what habeas procedures in the executive-detention context should look like (including, in particular, which party has the burden of proof and what the burden should be), and what remedy the federal court is authorized to provide to the successful habeas petitioner (immediate release or something else).

In a handful of Guantánamo-related decisions since 2004, the Supreme Court has shown respect for the information-forcing function of habeas. In *Rasul*, the Supreme Court overturned a D.C. Circuit Court of Appeals decision and held that the federal courts had jurisdiction under 28 U.S.C. § 2241 to decide habeas petitions filed by Guantánamo prisoners.<sup>122</sup> One way of understanding this decision is to recognize it as adopting a preference-eliciting or democracy-forcing rule: in the face of an ambiguous statute, the Court will retain authority over habeas matters at least until Congress makes clear, to both the public and the courts, that it wants to strip habeas rights from non-citizens detained as enemy combatants and being held outside of the sovereign United States.

Of course, if one of the purposes of the decision was really to elicit Congress’s preference with respect to such detentions, it seemed to have worked. Congress proceeded to pass the Detainee

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<sup>120</sup> *Id.* at i.

<sup>121</sup> *Id.* at ii.

<sup>122</sup> *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

Treatment Act of 2005,<sup>123</sup> which, to all appearances, stripped the federal courts of jurisdiction to hear the Guantánamo prisoners' habeas cases. Nonetheless, the Court held the next year in *Hamdan v. Rumsfeld* that Congress had not been sufficiently clear in stripping the courts of jurisdiction to hear habeas petitions that had already been filed in the federal courts.<sup>124</sup> Again, the Court was demanding a clear statement of Congress's intent to take the extraordinary step of stripping a federal court of its habeas jurisdiction. While at some level the *Hamdan* decision was clearly protecting the judiciary's turf and policing against a potential separation-of-powers violation, it was also demanding that Congress express its preferences clearly and stand ready to be held politically accountable for its decisions.<sup>125</sup>

The *Hamdan* decision led Congress to act yet again, and this time it made its preferences perfectly clear in the Military Commissions Act of 2006 (MCA).<sup>126</sup> Having successfully elicited Congress's preferences and forced a clear statement of its intent to strip the federal courts of habeas jurisdiction of the Guantánamo detainee cases, the Court was compelled to address the substance of the constitutional habeas right asserted by the detainees.<sup>127</sup> Because it was clear after the passage of the MCA that there was no longer any statutory authorization for the federal courts to exercise habeas jurisdiction, the Court was forced to decide in *Boumediene v. Bush* in 2008 whether the protections of the Suspension Clause extended to non-citizens detained as "enemy combatants" outside of the sovereign United States territory.<sup>128</sup> Equally important, if the Guantánamo prisoners in particular were entitled to some kind of due process protections via habeas, were the procedures that had been used by the military to determine "enemy combatant" status an adequate and effective substitute for habeas procedures in the courts?

The answers given by Justice Kennedy in *Boumediene* are consistent with an information-forcing approach to habeas. First, Justice Kennedy recognized that the Guantánamo prisoners had a constitu-

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<sup>123</sup> Pub. L. No. 109-148, 119 Stat. 2742 (codified as amended in scattered sections of 10, 28, and 42 U.S.C. (2006)).

<sup>124</sup> 548 U.S. 557 (2006).

<sup>125</sup> John Ferejohn and Barry Friedman note a similar "deliberation forcing" approach in the concurring opinions of Justices Souter and Scalia in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See Ferejohn & Friedman, *supra* note 37, at 847-48.

<sup>126</sup> Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

<sup>127</sup> See *Boumediene v. Bush*, 553 U.S. 723, 738-39 (2008) (acknowledging litigation history that prompted congress to pass MCA).

<sup>128</sup> *Id.* at 739.

tional right to habeas that was operative apart from any congressional authorization.<sup>129</sup> Had the Court held otherwise, the executive would have been under no obligation to release *any* information about its reasons for detaining individual prisoners. The Court's recognition of a constitutional right of the Guantánamo prisoners to habeas hearings (or, more accurately, a constitutional requirement that the government justify its detention decisions to the courts),<sup>130</sup> both protected separation of powers principles and necessarily had an information-forcing effect. Second, by dismissing the government's argument that its "enemy combatant" review procedures were an adequate and effective substitute for habeas review in the courts, Justice Kennedy's decision had the substantive effect of requiring the military to provide more information in a more public forum than it had to that point in time made available in its non-public Combatant Status Review Tribunals (CSRTs)—which detainees' counsel were not allowed to attend.<sup>131</sup> Third, the presumptive penalty default for the government's failure to provide the court with adequate factual justification for the detention of a Guantánamo prisoner was a court-ordered release.<sup>132</sup>

While the Supreme Court's decisions have been consistent with the information-forcing role of habeas, the course of litigation in the lower federal courts in the federal district for the District of Colum-

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<sup>129</sup> *Id.* at 771.

<sup>130</sup> See Robert Knowles & Marc D. Falkoff, *Toward a Limited Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 641 (2007) (suggesting that the proper inquiry should focus on powers granted to the government by the Constitution, rather than on "rights" possessed by prisoners); Falkoff & Knowles, *supra* note 46, at 851 (same).

<sup>131</sup> See Memorandum from Gordon England, Sec'y of the Navy, at Enclosure (1), § F(5) (Jul. 29, 2004), available at <http://www.defense.gov/news/Jul2004/d20040730comb.pdf> ("The detainee shall not be represented by legal counsel . . ."). The implementation procedures for the CSRTs did not proscribe press observers from attending the hearings, but no notice to the public was given in advance of the hearings, and reporters were allowed to attend only if they were otherwise on the naval base and had made a special request. See Transcript of *Annual Administrative Review Boards for Enemy Combatants Held at Guantánamo*, U.S. DEP'T OF DEFENSE, March 6, 2007, available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3902> (statement of Senior Defense Official). The result was that 521 of the 558 tribunals held in 2004 and 2005 were observed by no members of the press or public. *Id.*

<sup>132</sup> See *Boumediene*, 553 U.S. at 779 (citing *Ex parte Bollman*, 8 U.S. 75, 117 (1807), for proposition that where the detention is unlawful, the court "can only direct [the prisoner] to be discharged") ("[T]he habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.").

bia, where all of the Guantánamo cases have been heard, has been spottier. To be sure, at the district court level the judges have worked to put into effect the mandate of *Boumediene*, devising procedures, with minimal guidance from the Supreme Court, that are consistent with due process and the information-forcing purposes of habeas. The district court consolidated for case management purposes all of the Guantánamo habeas petitions pending in the district, so that all of the judges were following the same set of procedures. These common procedures included a requirement that the government file “returns” or answers to the detainees’ habeas petitions, a requirement that the government search for and provide exculpatory evidence to the petitioners, and provisions for limited discovery and evidentiary hearings—all of which were designed to flush more information from the military than it was willing to release voluntarily in the CSRTs.<sup>133</sup> In addition, the judge before whom case management issues were consolidated concluded that the government had the burden of justifying the legality of the detention, and that it had to prove the prisoner was a detainable “enemy combatant” by a preponderance of the evidence (rather than by merely “some evidence,” as the military had initially argued).<sup>134</sup> One result of this “heightened” standard was to force the government to provide the public with more information about the detention than would have been required under a lower standard.<sup>135</sup> Finally, as we discuss briefly below, the Case Management Order requires the government to file unclassified versions of each factual return within fourteen days of the filing of the classified version with the court (or within fourteen days of the November 6, 2008, issuance of the Case Management Order for returns that had already been filed).<sup>136</sup>

From an information-forcing point of view, the promulgation and deployment of these procedures at the district court level has been generally effective. Of course, more than thirty prisoners have had their detentions declared illegal since these procedures went into

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<sup>133</sup> Case Management Order, *In re* Guantánamo Bay Detainee Litig. at 2–3, 6, No. 08-0442, (D.D.C. Nov. 6, 2008) [hereinafter Guantánamo CMO], available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008mc00442/131990/940>.

<sup>134</sup> *Id.* at 4–5.

<sup>135</sup> Recently a panel of the Court of Appeals for the D.C. Circuit stated, in dicta, that the preponderance standard might be too high for these habeas cases. *See* *Al-Adahi v. Obama*, 613 F.3d 1102, 1104–05 (D.C. Cir. 2010). “Although we doubt, for the reasons stated above, that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case.” *Id.* at 1005.

<sup>136</sup> Guantánamo CMO, *supra* note 133, at 2.

effect in the wake of *Boumediene*,<sup>137</sup> which is the primary consideration for the prisoners themselves. But from a structural point of view, other effects have been equally interesting. Most importantly, the public has learned a great deal about the quality and quantity of evidence that the military possesses about the prior criminal, terrorist, and combatancy history of many of the individual detainees. In many cases, the evidence has been adequate to convince district court judges (and, subsequently, appellate court judges) that the detainee was more likely than not an enemy combatant who was properly detainable under the Authorization for the Use of Military Force.<sup>138</sup> That alone adds legitimacy to the detention decisions of the military, which had heretofore been reduced to justifying its detention decisions to the public merely on its own assertions. In more than thirty cases, however, the public has likewise learned that the government had detained individuals at Guantánamo for up to nine years on the basis of scant evidence indeed—and often this evidence was incontestably procured as the result of torture or abusive conduct.<sup>139</sup> In fact, the release of several prisoners on the eve of their habeas hearings may well have been motivated by the military's desire not to reveal how poor its cases against the detainees were.<sup>140</sup>

Other aspects of the district courts' handling of the Guantánamo habeas hearings have, however, seemed contrary to the information-forcing spirit of the *Boumediene* decision. Most importantly, the dis-

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<sup>137</sup> See, e.g., Warren Richey, *In Antiterror Fight, Obama Hears Much the Same Criticisms as Bush*, STAR-LEDGER (Newark, N.J.), Oct. 18, 2009, at 6 (“Of 38 Guantánamo habeas corpus cases in which judges had examined the government’s evidence, 30 detainees had been ordered released.”).

<sup>138</sup> As of September 2011, the U.S. Court of Appeals for the D.C. Circuit had affirmed seven district court denials of the writ to Guantánamo petitioners. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 868–69 (D.C. Cir. 2010).

<sup>139</sup> See, e.g., *Hatim v. Obama*, 677 F. Supp. 2d 1, 3 (D.D.C. 2009) (granting writ to Guantánamo prisoner and noting that, “[s]ignificantly, the government does not contest the petitioner’s claims of torture”), *vacated and remanded on other grounds*, *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011).

<sup>140</sup> The circumstances of Faruq Ali Ahmed’s release are a case in point. On October 8, 2009—more than seven and a half years after Ahmed’s arrival at Guantánamo—the district court judge for his case scheduled a habeas merits hearing for November 2, 2009. See Prehearing Order, *Abdah v. Obama*, 04-CV-1254 (D.D.C. Oct. 8, 2009). The merits hearing never occurred, though Ahmed had been seeking one since he filed a habeas petition in July 2004. No information has been made public about why no hearing was held, but the court’s docket reveals literally dozens of “sealed” notices of filings, status reports and orders from October through December 2009. Ahmed was released from Guantanamo and transferred to his home in Yemen on December 19, 2009. See *The Guantanamo Docket: Faruq Ali Ahmed*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/32-faruq-ali-ahmed> (last visited Oct. 20, 2011) (noting the date of Ahmed’s transfer).

strict court judges have generally been unwilling to demand that the government fulfill its obligations to litigate the cases in a public manner and to reveal to the public information that is neither classified nor for which release would represent a national security threat. A look at the dockets of the Guantánamo habeas cases will show entry after entry of filings from the government under seal, as well as a disturbing number of entries that reveal *ex parte* filings to which not even the detainees' lawyers—all of whom have at least secret-level security clearances—are privy.<sup>141</sup> While there is no doubt that the district court has an obligation to respect government assertions that classified information has to be protected, the shroud of darkness that has been drawn over these cases is worthy of remark.

In addition, even at this late date, the government has not yet complied with the Case Management Order requirement that it files unclassified versions of the factual returns within fourteen days of filing classified versions of the returns. This requirement is consistent not only with our national tradition of open court proceedings, but also with the information-forcing and thus democracy-enhancing role of the writ. So long as the government is withholding from the public the (unclassified, at least) facts supporting its detention decisions, there was no way for the public even to begin to judge the legitimacy and competency of the executive's conduct in the "War on Terror."

The government complied with the Case Management Order in December 2008 but did so by filing "unclassified" versions of the factual returns that it simultaneously designated in their entirety as "protected information"—meaning that the documents could not be viewed by the public or filed on the public docket because, in theory, they contained sensitive (albeit unclassified) information.<sup>142</sup> The procedures for designating information as "protected" under the protective order in place in the Guantánamo cases did not, however, authorize that kind of wholesale shielding of information from the public; the D.C. Circuit Court of Appeals had twice before disallowed similar government behavior.<sup>143</sup> In the spring of 2009, the govern-

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<sup>141</sup> For example, the docket sheet in *Abdah v. Bush* reveals that the government has made at least eight *ex parte* filings since January 2009. See Docket Sheet, *Abdah v. Bush*, 04-CV-1254, 411, 429, 461, 604, 674, 680, 889, 905 (D.D.C. Sept. 20, 2004).

<sup>142</sup> *Id.* at 1244, 1379.

<sup>143</sup> See *Parhat v. Gates*, 532 F.3d 834, 836–37 (D.C. Cir. 2008) (rejecting government's "generic" explanations for why certain information should be designated "protected" and subject to sealing); *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) (rejecting government attempts to make unilateral determinations about whether information should be designated as "protected" and therefore subject to sealing).

ment sought district court confirmation of the “protected” status of the returns, something to which the Guantánamo prisoners and press intervenors objected. The district court judge denied the government’s motion in the summer of 2009 and ordered unclassified factual returns to be filed on the public record.<sup>144</sup> The government again complied with the letter of the order but did so by filing versions of the factual returns that simply redacted the non-classified information that it had earlier sought to be treated as protected. Again the district court heard arguments, and in January 2010 held that the government had failed to follow the court’s summer 2009 order.<sup>145</sup>

As of October 2010, the government had still not complied with the order, another hearing about the status of the unclassified versions of the returns was held, and in May 2011 the district court issued yet another memorandum opinion and order, discussing again the procedures for the government to seek “protected” status for designated information in the returns.<sup>146</sup> The saga continues, and to date, the Government still has not yet made the full versions of the factual returns available to the public. Although the district court judge responsible for overseeing compliance with these orders denied the press intervenors’ request that the government be sanctioned for its conduct in this matter, it is plain that the government’s litigation tactics have successfully stalled public availability of the factual returns for the prisoners for literally years. One interesting effect of this delay is that the detainees’ lawyers find themselves stymied by the rules of the protective order and are unable to use government concessions from the factual returns in the defense of their clients in the court of public opinion—even as classified documents concerning the prisoners have been posted on the Internet by Wikileaks.<sup>147</sup> At any rate, we believe that part of the reason the district court has tolerated these government shifts is that—on the invitation of the press intervenors—it has viewed the provision of factual returns to the public as founded in a First Amendment right to view all civil hearings,

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<sup>144</sup> *In re* Guantánamo Bay Detainee Litig., 630 F. Supp. 2d 1, 13 (D.D.C. 2009) (mem.).

<sup>145</sup> Order Denying Press Intervenors’ Motion for Order to Show Cause at 1–2, *In re* Guantánamo Bay Detainee Litig., No. 08-0442 (D.D.C. Jan. 14, 2010) (“[The] Court finds that the Government has failed to comply with the Court’s June 1, 2009 order.”).

<sup>146</sup> *In re* Guantánamo Bay Detainee Litig., No. 08-0442, 40–42 (D.D.C. May 31, 2011) (mem.).

<sup>147</sup> See Charlie Savage et al., *Details of Lives in an American Limbo*, N.Y. TIMES, Apr. 24, 2011, at A1.

including habeas hearings.<sup>148</sup> The court might be less willing to brook the government's delay, however, if it considered the unique, information-forcing role of the habeas process,<sup>149</sup> which, after all, was designed to guard against the worry, articulated by Blackstone, that "confinement of the person, by secretly hurrying him off to jail, where his sufferings are unknown or forgotten, is a less public, less striking, and therefore more dangerous engine of arbitrary Government."<sup>150</sup>

Perhaps most distressing, however, has been the response to the Guantánamo habeas cases from the D.C. Circuit Court of Appeals, which has been undermining the information-forcing foundation of the Supreme Court's "War on Terror" decisions. In particular, the D.C. Circuit has issued several opinions that cut against the information-forcing role of habeas. Most importantly, in *Kiyemba v. Obama*, the D.C. Circuit reversed a district court order to the government to either find a suitable country for the release of several Uighur habeas winners or else release them into the United States.<sup>151</sup> The D.C. Circuit, which stated that the federal courts do not have the power to order the executive to bring non-citizens into the country,<sup>152</sup> effectively removed the default penalty—an order of release from the district court if the government does not provide information justifying a detention—from the habeas equation. After the D.C. Circuit's decision in *Kiyemba*, there is nothing that will compel the government to provide information to the detainee (or to the public, for that matter) to justify the detention.

#### CONCLUSION

In this Article, we have offered a conceptual model for understanding an important structural role that the writ of habeas corpus plays in our constitutional system. We believe that a properly func-

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<sup>148</sup> *In re* Guantánamo Bay Detainee Litig., 630 F. Supp. 2d at 12–13.

<sup>149</sup> The district court did, however, note: "Public interest in Guantánamo Bay generally and these proceedings specifically has been unwavering. The public's understanding of the proceedings, however, is incomplete without the factual returns." *Id.* at 11.

<sup>150</sup> BLACKSTONE, *supra* note 71, at 185.

<sup>151</sup> 555 F.3d 1022, 1029 (D.C. Cir. 2009) ("And so we ask again: what law authorized the district court to order the government to bring petitioners to the United States and release them here? It cannot be that because the court had habeas jurisdiction it could fashion the sort of remedy petitioners desired.") (citation omitted), *vacated*, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010), *reinstated and modified on remand*, *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

<sup>152</sup> *Id.*

tioning process for seeking habeas relief serves all parties and all institutional actors well, and that under the pressure of national security concerns, courts have not always satisfactorily addressed the challenges presented by cases arising from the “War on Terror.” Although we advocate a robust judicial enforcement of the obligation of the return, we nowhere argue for a radical transparency, and we accept that some information is properly classified and protected by the executive branch. We believe, however, that those instances should be the exceptions, not the norm.

We make this argument, in part, because we have seen the very real effects of a simple requirement that the government justify its position to an independent judge, rather than being allowed to obscure its evidence and reasoning through the assertion of national security. In the early days of the Guantánamo habeas litigation, the Justice Department responded to a set of habeas petitions that had been assigned to Judge Richard Leon not with a return, but with a motion to dismiss. The government argued that because the executive’s decision to detain the seven petitioners at issue was unrevealed, and because these men had no rights under the U.S. Constitution that they could vindicate, the court should summarily dismiss the pending petitions. After full briefing and oral argument, Judge Leon agreed with the government and summarily dismissed the petitions.<sup>153</sup> One of those petitions was filed on behalf of a man named Lakhdar Boumediene.<sup>154</sup> His petition, and that of the other petitioners, eventually made its way to the Supreme Court, which, of course, rejected the government’s position.<sup>155</sup> Remarkably, after further proceedings, including the government’s filing of a return for each of the petitions, the very same Judge Leon granted all but one of the petitions and ordered the men released.<sup>156</sup> The distinguishing factor between the Judge Leon of 2005 and the Judge Leon of 2008 is that he was able to see the government’s asserted basis for detention and conclude that it was inadequate.

Each of the five men who were eventually ordered released by Judge Leon because of the inadequacy of the government’s asserted justification (a justification offered after six years of detention and with classified evidence permitted) would have been stopped cold in

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<sup>153</sup> See *Khalid v. Bush*, 355 F. Supp. 2d 311, 323 (D.D.C. 2005) (“[P]etitioners lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantánamo.”).

<sup>154</sup> *Id.* at 316.

<sup>155</sup> *Boumediene v. Bush*, 553 U.S. 723, 726 (2008).

<sup>156</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197–98 (D.D.C. 2008).

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their efforts to contest their detention under the government's original position. Not only would the detainees not have prevailed, but they would not have been permitted to even hear an accounting from the government as to why it was depriving them of their liberty.