No. 20-827

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner*,

—v.—

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
AKA ABU ZUBAYDAH, et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENTS


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## STATEMENT OF INTEREST[1]

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Since 9/11 CCR has litigated dozens of cases challenging violations of international and domestic human rights law. CCR twice successfully litigated Guantánamo detainee cases to this Court, in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008), and since *Rasul* has coordinated the work of the hundreds of *pro bono* counsel working on individual detainees' cases while directly representing numerous clients in habeas proceedings and before the military commissions.[2]

CCR has also litigated challenges to the government's practice of extraordinary rendition of foreign nationals for interrogation in countries notorious for torture, *see Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), challenges to the torture and abuse of Iraqi citizens by private contractors in conspiracy with U.S. soldiers, *see Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016) (torture is legal, not political question), and the targeted killing of U.S.

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[1] All parties have consented in writing to the filing of this amicus brief. *Amicus* and their counsel have authored the entirety of this brief, and no person other than *amicus* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *See generally* Michael Ratner, *Litigating Guantánamo*, in International Prosecution of Human Rights Crimes 202 (Springer 2007).

citizens, *see Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014). CCR has also filed complaints in Germany, Spain, France, Canada, and in the International Criminal Court under the principle of Universal Jurisdiction, seeking accountability against U.S. officials for torture.

CCR submits this amicus brief to document from its experience many examples whereby government claims to secrecy and attempts to foreclose judicial review on grounds of national security have served to cover up incompetence, abuse, and violations of law and which have otherwise not produced the harms to national security the government reflexively recites. The tailored judicial review authorized by the Ninth Circuit in this case—like the judicial review made available in other cases implicating national security described below—correctly preferences democratic accountability over executive fiat.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, Zayn al-Abedin Mohammed Husayn, a.k.a. Abu Zubaydah, is an iconic victim of the sprawling, violent, and lawless so-called "global war on terror." Abu Zubaydah was apprehended by U.S. forces outside an active battlefield in a raid on a guest house in Pakistan, then unlawfully transferred to a secret overseas detention site where he was tortured by a variety of barbarous techniques, applied ever more harshly for his lack of useful intelligence. He subsequently disappeared into an archipelago of secret CIA "black sites," where he was subjected to additional sustained torture and abuse by U.S. officials in

violation of U.S. and international law, including prohibitions on inhumane treatment contained in Article 3 of the 1949 Geneva Conventions applicable to individuals such as Abu Zubaydah,[3] as well as the domestic criminal laws of the countries in which he was held.[4] In 2006, he was transferred to Guantánamo, where he has been held for fifteen years without charge or trial. Like many Muslim individuals swept up in post-9/11 U.S. counterterrorism practices, Abu Zubaydah was demonized[5] and his boundless detention and mistreatment was fueled by baseless suspicion.

As outrageous as the government's treatment of Abu Zubaydah was, it was not exceptional. Amicus CCR has represented many dozens of individuals across a continuum of post-9/11 detention and torture practices that the government has sought to conceal from judicial review. CCR represented the first individuals challenging their incommunicado detention at Guantánamo Bay and has since represented or otherwise assisted in the representation of dozens of others, nearly all of whom, despite the United States'

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[3] *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (protections in Common Article 3 apply to persons placed *hors de combat* by detention).

[4] *See Abu Zubaydah v. Poland*, App. No. 7511/13, Eur. Ct. H.R. at ¶ 171–74 (24 July 2014); *Abu Zubaydah v. Lithuania*, App. No. 46454/11, Eur. Ct. H.R. at ¶ 212–13 (31 May 2018). *See also Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. at ¶ 6 (24 July 2014).

[5] Joseph Margulies, *The Myth of the Superhuman Terrorist*, Natl. L.J. (Nov. 23, 2009); Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. Rev. 1683, 1696 (2009).

exaggerated claims, had no meaningful connection to 9/11 or terrorism. CCR represented Majid Khan in habeas and before the military commissions, another survivor of grisly torture in secret CIA custody, whom the government fought to keep out-of-reach of legal counsel upon his transfer to Guantánamo. CCR represented one of a number of victims of the government's "extraordinary rendition" program, Maher Arar, who U.S. officials secreted from JFK airport to a grave-like cell in Syria for the purpose of being interrogated under torture. CCR has also represented over 330 Iraqi citizens subject to torture and inhumane treatment by private contractor employees acting in concert with U.S. soldiers at U.S. detention centers in Iraq.

CCR's experience has revealed three basic truths about the conduct of the United States government's post 9/11 detention and torture practices:

One: the government reflexively attempts to defeat judicial review of its practices by asserting that executive branch interests in national security categorically trump the oversight role of the judicial branch.

Two: litigation revealed that the government's initial attempts to foreclose judicial review were likely not driven by creditable national security interests, but by a fear of exposure of the U.S. government's embarrassing and unlawful conduct.

Three: in nearly every case, the executive was proved wrong. The asserted harms to national security were exaggerated or false, and courts were able to competently manage their constitutional responsibilities while protecting *bona fide* national security interests in tailored ways.

## ARGUMENT

In the twenty years since the United States initiated a so-called "global war on terror," the government has reflexively opposed individuals' access to federal courts in order to challenge any of the myriad, extraconstitutional counterterrorism policies the government pursued. Examples of this misguided government reflex are too numerous to catalog here, but are nevertheless made evident from even a selection of substantial legal challenges led by CCR. Each of these examples show that the government's impulse to assert total executive prerogative in order to evade judicial review—accompanied as it is in this case, by a claim that any adjudication will irreparably harm national security—has proved demonstrably wrong.

When afforded the opportunity to undertake judicial review, district courts have consistently shown "expertise and competence,"[6] in balancing a hearing on the merits of a litigant's claims with the government's asserted interest in security. Moreover, that adjudication ultimately pulled back the curtain covering the executive's resistance to judicial review, to reveal a fear of revealing government mistruths, incompetence, and abuse. Given two decades of experience (and beyond) with government exaggerations regarding the supposed harms judicial review would cause to national security, the government should not be afforded a strong presumption of plausibility or deference to asserted national security harms in this case.

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6 *Boumediene v. Bush*, 553 U.S. 723, 796 (2008).

## I. INDEFINITE DETENTION AT GUANTÁNAMO BAY

From its inception, Guantánamo has been a central component in the government's global post-9/11 detention operation, founded as it was on the executive's claim to unreviewable detention authority and the power to facilitate unlawful interrogations with impunity.[7] Publicly, the Bush administration sought to defend the creation of a prison-beyond-the law at Guantánamo by relying on three narratives it could defend only as long as the prison remained free from judicial review or legal constraint. First, administration officials routinely described detainees held there as "the worst of the worst" or the kind of monsters who could "gnaw the hydraulic lines in the back of a C-17 [military plane] to bring it down."[8] Second, administration officials, despite eschewing the required protections of the Geneva Conventions, assured the public that detainees were being treated humanely. Third, administration officials projected confidence around the independence, competence, and correctness of their detention decisions. As demonstrated below, each of these narratives—sustainable only through a regime of secrecy—was exposed to be untrue. *See infra* Section (I)(A)(2). These examples likewise display the executive branch's exaggerated—and sometimes demonstrably untrue—claims that tailored judicial review would harm national security.

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[7] *See* Joseph Margulies, Guantánamo and the Abuse of Presidential Power (2007).

[8] Katharine Q. Seelye, *First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. Times, Jan. 12, 2002, at A7.

## A. JUDICIAL REVIEW AND COLLAPSE OF GUANTÁNAMO MYTHMAKING

### 1. Judicial Rejection of Government's Assertion of Total Executive Prerogative

Bush Administration officials, based on far-fetched national security assertions, insisted on keeping the names of detainees secret and otherwise holding detainees *incommunicado*.[9] Nevertheless, CCR learned the identities of European and Australian detainees and filed the first habeas petitions—on behalf of Next Friend family members—in February 2002.[10] Throughout the litigation—culminating in this Court's decision in *Rasul v. Bush* (as well as in a companion case involving a U.S. citizen, Yasser Hamdi), the government took a maximalist position regarding executive prerogative, to the exclusion of any judicial review. In *Rasul*, the government contended among other jurisdictional arguments, that the military's determination that "the Guantanamo detainees are enemy combatants," and the President's "conclusive[] determin[ation] that the Guantanamo detainees ... are not entitled to prisoner-of-war status under the Geneva Conventions," are total and conclusive,[11] and

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[9] *Associated Press v. U.S. Dep't of Def.*, 395 F. Supp. 2d 15, 16 (S.D.N.Y. 2005) (Defense Department claims harm from possibility that "terrorist groups or other individuals abroad are displeased by something the detainee said to the Tribunal").

[10] *See Rasul v. Bush,* 542 U.S. 466, 471 (2004).

[11] *See* Brief of Respondent at 36*, Rasul v. Bush*, No. 03-343 (U.S., Oct. 21, 2004).

that access to habeas and counsel would undermine "the military's ability to win the war."[12]

In other cases, such as *Padilla v. Rumsfeld* and *Al Marri v. Pucciarelli*, the Bush Administration engaged in manipulative behavior to evade judicial review entirely.[13] And, when questioned in the *Padilla* oral argument about the limits of the government's position—that is, if it would permit the commission of torture—the then-Solicitor General indignantly responded, "our executive doesn't ... [and] [w]here the government is on a war footing ... you have to trust the executive to make the kind of quintessential

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[12] *Id.* at 43.

[13] In *Padilla*, just two days before a hearing on Padilla's motion to dismiss a material witness warrant, the President designated Padilla an "enemy combatant" and transferred him into Defense Department custody, *see Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 48–49 (S.D.N.Y. 2003), where he was held incommunicado for months and subject to a brutal regime of isolation and interrogation, Moreover, just before its opposition to Padilla's petition for certiorari from the Fourth Circuit's decision approving his detention was due, the Government indicted the putative "enemy combatant" in a seemingly transparent attempt "to avoid consideration … by the Supreme Court." *Padilla v. Hanft*, 432 F.3d 582, 585 (4th Cir. 2005).

Similarly, in *Ali al-Marri v. Pucciarelli*, the government designated a lawful permanent resident apprehended in his home in Peoria, Illinois and charged with bank fraud, as an "enemy combatant" the Monday after a district court judge scheduled a motion-to-dismiss hearing. 534 F.3d 213, 219, 220 (4th Cir. 2008), *vacated*, 555 U.S. 1220 (2009). Attorney General Ashcroft explained that al-Marri was transferred to secretive military custody because he "insisted on becoming a hard case," presumably because he elected to assert his constitutional entitlement to trial by jury. John Ashcroft, Never Again: Securing America and Restoring Justice 168–69 (2006).

military judgments that are involved in things like that."[14] That statement was made just several days before depictions of the "Gtmo-ized" prison in Abu Ghraib revealed grotesque torture, humiliation and cruelty toward the Muslim prisoners detained there.[15]

Correctly rejecting the government's absolutist position, this Court in *Rasul* concluded that the habeas statute did apply to a territory like Guantánamo and in part because of the historic function of habeas to impose a check on the dangers of executive detention, 542 U.S. at 474. The Court thus authorized statutory habeas challenges to the legality of indefinite detention there, and more fundamentally recognized the illegitimacy of a project of secretive executive detention beyond the law. In *Hamdi v. Rumsfeld*, the Court likewise rejected the government's claim that its detention decisions are left completely to executive discretion, explaining that the position "serves only to condense power into a single branch of government," 542 U.S. 507, 535–36 (2004); *see also id.* (explaining that war is not a presidential "blank check" and courts must "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims [of individual rights] like those presented here").

Nevertheless, the government continued to make every effort to resist judicial review contemplated by *Rasul* (and released Hamdi to his home country

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[14] Charles Lane, *Iraq Prison Abuse May Hurt Administration in Court*, Wash. Post, May 13, 2004.

[15] Rebecca Leung, *Abuse of Iraqi POWs by GIS Probed*, 60 Minutes II, CBS News, Apr. 27, 2004.

rather than produce a factual return substantiating the grounds for his detention), seeking instead to create an exclusive and narrow regime of administrative review of military detention decisions, shrouded in continued secrecy, and incapable of making fair and competent determinations, as it was later revealed. *See infra* at 21 (discussing "myriad defects" of the military's enemy combatant designation process via Combatant Status Review Tribunals ("CSRTs")).

The executive branch meanwhile successfully lobbied Congress to pass successive jurisdiction stripping provisions—the Detainee Treatment Act of 2005 ("DTA")[16] and, following the conclusion of this Court in *Hamdan v. Rumsfeld* that the DTA was not retroactive,[17] a fully retroactive jurisdictional strip in the Military Commissions Act of 2006 (MCA)—which attempted to displace judicial review with the conclusive (and wildly flawed) results of the military's secretive and defective CSRT determinations of detainees' "enemy combatant" status.[18]

### 2. Exposure of Central Untruths Undergirding Guantánamo Detentions

Even while the government attempted to forestall *bona fide* habeas hearings to adjudicate the factual or legal basis for detentions, a consequence of *Rasul* was,

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16 Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741–42 (2005).

17 *Hamdan,* 548 U.S. at 662.

18 *See* Military Commissions Act of 2006 § 7, Pub. L. 109-366, 120 Stat. 2600 (2006) (codified as amended at 28 U.S.C. § 2241(e) (2008)); *Boumediene*, 553 U.S. at 732–39 (describing circumscribed judicial review under DTA-MCA scheme).

at a minimum, to guarantee detainees access to counsel—a process CCR took responsibility for coordinating. By mid-2006, nearly all Guantánamo detainees had counsel such that access to first-hand accounts of the detainees' experiences—which the government had desperately sought to keep secret under pretext of national security—revealed that the government's defense of Guantánamo rested on a foundation of misrepresentations, chief among them that: (a) the detainee population were "the worst of the worst" or "killer terrorists," (b) detainees were treated humanely in Guantánamo; (c) the military could be trusted to develop adequate processes and make competent judgments about who should be detained.

### a. The Overwhelming Majority of Detainees Had No Connections to Terrorism.

At the same time high-level government officials were publicly proclaiming that Guantánamo was filled with individuals connected to 9/11, military and intelligence officials privately understood (and sought to keep secret) that Guantánamo was filled with individuals in the wrong place at the wrong time who were swept up or turned over by inducement of substantial bounty.[19] Studies of the government's evidence

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[19] Brigadier General Martin Lucenti, then-deputy commander of the military task force that ran the detention center, stated: "[o]f 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, *U.S. Officer Predicts Guantanamo Releases*, Fin. Times (London), Oct. 4, 2004; *See also* Tim Golden & Don Van Natta, Jr., *The Reach of War;*

(*footnote continued …*)

confirmed this to be true.[20] According to one such study of the government's proofs from 517 CSRT records, 86% of detainees were not apprehended on any battlefield but rather arrested and placed in U.S. custody by Pakistan or the Northern Alliance after the United States offered large financial bounties for the capture of "Arab terrorists";[21] only eight percent were alleged to be al Qaeda fighters;[22] and a majority of

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*U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. Times, Jun. 21, 2004, at A1 ("Officials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantanamo was flawed."); Frontline: Son of Al Qaeda (PBS television broadcast Apr. 22, 2004), (quoting knowledgeable CIA operative as estimating that "only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here").

[20] Tom Lasseter, *Day 1: America's Prison for Terrorists Often Held the Wrong Men*, McClatchy Newspapers, June 15, 2008, ("An eight-month McClatchy investigation in 11 countries on three continents has found that [there are] perhaps hundreds [of men] whom the U.S. has wrongfully imprisoned in Afghanistan, Cuba and elsewhere on the basis of flimsy or fabricated evidence, old personal scores or bounty payments."); Stuart Taylor, Jr., *Falsehoods About Guantanamo*, Nat'l J., Feb. 4, 2006, at 13 (studying Defense Department disclosures about detainees and concluding that "fewer than 20 percent ... have ever been Qaeda members[,]" that "perhaps hundreds ... of the detainees were not even Taliban foot soldiers," and that "[t]he majority were ... handed over by reward seeking Pakistanis and Afghan warlords and by villagers of highly doubtful reliability").

[21] *See* Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, Seton Hall Pub. L Res. Paper No. 46 (2006), available at SSRN: https://ssrn.com/abstract=885659.

[22] *Id*. at 4, 17.

detainees never participated in any "hostile acts" against the United States or allies, but were detained because of a varyingly loose "association with" one of seventy-two groups the military asserted to have some unspecified connection to al Qaeda or other terrorist groups;[23] others were detained simply because they wore Casio watches or olive drab clothing.[24]

Indeed, in a number of cases, habeas proceedings revealed that the government kept individuals detained as enemy combatants despite clear knowledge of their innocence. For example, the classified file for former detainee Murat Kurnaz (later made public) revealed the government's definitive conclusion that Kurnaz had no connections to terrorism, despite their insistence in the CSRT and in federal court that he was an enemy combatant.[25] As early as 2002, U.S. intelligence officials concluded "there is no information that Kurnaz received any military training or is associated with the Taliban or Al Qaeda," that, according to German intelligence officials in 2002, the "USA considers Murat Kurnaz's innocence to be proven."[26]

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[23] *Id.*

[24] *Id.* at 10; *see also* Editorial, *They Came for the Chicken Farmer*, N.Y. Times, Mar. 8, 2006, at A22 (describing the case of a chicken farmer in Pakistan, detained because his name resembled the Taliban deputy foreign minister's name).

[25] Carol D. Leonnig, *Panel Ignored Evidence on Detainee*; *U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, Wash. Post, Mar. 27, 2005, at A1 (quoting once-classified statements in Kurnaz's file demonstrating that both the U.S. military and his home German government recognize he had no connections to terrorist groups).

[26] Carol D. Leonnig, *Evidence of Innocence Rejected at Guantanamo*, Wash. Post, Dec. 5, 2007, at A1; *see also In re*

(*footnote continued ...*)

Because Kurnaz had no access to this definitively exculpatory evidence, and no counsel during the CSRT process, he could not present these findings in defense of the otherwise preposterous claims lodged against him in the CSRT. *See infra* at 21.

Similarly, for the 22 Uighur detainees held at Guantánamo, "[s]oon after they were picked up in 2002, [United States] intelligence and security personnel concluded that they posed no threat to the United States."[27] The Uighurs would nonetheless spend years in Guantánamo as part of a secret *quid pro quo* whereby the United States designated a purported Uighur group—the East Turkistan Islamic Movement—as a terrorist organization as a pretext for the Uighurs' continued imprisonment, all in exchange for Chinese diplomatic acquiescence in the invasion of Iraq.[28] In fact, when the Uighur men sought their release through judicial process, the government's supposedly inculpatory classified evidence was

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*Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 470–71 (D.D.C. 2005) (discussing exculpatory evidence in Kurnaz's classified file which he could not access to contest otherwise legally insufficient charges against him); Baher Azmy, Epilogue to Murat Kurnaz, Five Years of My Life: An Innocent Man in Guantánamo 239, 235–51 (2008) (describing weakness of allegations against Kurnaz); *60 Minutes: Nightmare at Guantánamo Bay* (CBS television broadcast Mar. 30, 2008) (disclosing evidence of innocence in Kurnaz's case).

[27] *See* Tr. of Hearing, Subcommittee on International Organizations, Human Rights, and Oversight of the House Committee on Foreign Affairs (Serial No. 111-53) (Jul. 16, 2009) at 66 ("Tr."). They were reportedly formally cleared for release from Guantánamo by late 2003. *See* Robin Wright, *Chinese detainees are men without a country*, Wash. Post, Aug. 24, 2005.

[28] Tr. at 60.

all so similar it seemed to have a "common source"—which the D.C. Circuit noted was credibly alleged to be the Chinese government. *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008). That court, finding the "evidence" insufficient to justify their classification as "enemy combatants," ordered the government to either provide the Uighurs new hearings or release them. *Id.* at 854. Two years later, the last of the 22 were resettled in third countries, after nearly a decade in wrongful detention.

**b. U.S. Military Officials Subjected Detainees to Torture and Cruel, Inhuman, and Degrading Treatment.**

Even as the Bush Administration declared it would not abide by provisions of the Geneva Conventions, including by necessity its prohibitions on torture and cruel, inhuman, and degrading treatment ("CIDT"),[29] President Bush declared that "[a]s a matter of policy, the United States shall continue to treat detainees humanely."[30] In fact, as a matter of policy and practice, the U.S. government engaged in a systematic practice of physical and psychological brutality that constituted torture and CIDT.[31]

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[29] Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[30] Memo from President Bush to White House Senior Executive Branch Officials, "Humane treatment of al Qaeda and Taliban detainees," Feb. 7, 2002.

[31] *See generally*, Larry Siems, The Torture Report: What the Documents Say about America's Post 9/11 Torture Program

(*footnote continued …*)

Once lawyers were able to access detainees whom the U.S. had formerly kept incommunicado, they relayed story after harrowing story of detainee torture and abuse. CCR catalogued these reports of torture and abuse in a comprehensive 2006 report,[32] which included consistent accounts of: psychological abuse (such as solitary confinement, light and sound manipulation, exposure to the elements and to temperature extremes, prolonged sleep deprivation, and threats of transfer for torture in another country);[33] physical abuse, (including violent beatings, short-shackling and other acutely painful stress positions);[34] sexual provocation, rape and harassment;[35] and religious and cultural humiliation.[36]

Similar to Abu Zubaydah, the first Guantanamo detainee to have a "special interrogation plan" drafted in Washington to approve the methods of torture to be applied to him in exacting detail was CCR client Mohammed al Qahtani, whose torture only became public when a log of his interrogation sessions was leaked to *Time* magazine and published in 2005. [37] The

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(2012); Jane Mayer, The Dark Side: The Inside Story of How The War on Terror Turned Into a War on American Ideals (2008).

[32] Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment at Guantanamo Bay, Cuba* (2006).

[33] *Id*. at 16–20.

[34] *Id*. at 20–22.

[35] *Id*. at 24–25

[36] *Id*. at 25–28.

[37] *See* Adam Zagorin &Adam Duffy, *Inside the Interrogation of Detainee 063*, Time, June 20, 2005.

government eventually admitted that he had been "tortured."[38] But long before "special interrogation" techniques were applied to al Qahtani to drive him to the brink of madness, he was already manifesting clear symptoms of his longstanding and severe schizophrenia.[39] The secrecy attending every aspect of al Qahtani's case shielded this grim irony from public view for years—by which point the public's attention had moved on to even more egregious abuses perpetrated against detainees by the CIA.

On September 6, 2006, President Bush announced the transfer of 14 so-called "high-value" detainees from secret CIA detention to Guantánamo, including Abu Zubaydah and CCR client Majid Khan. Later that month, CCR filed a habeas petition on behalf of Khan and sought prompt access to him at Guantánamo.

The government opposed the request for access to Khan, arguing that affording him the ability to meet with his lawyers threatened "exceptionally gave danger" to the United States because the "CIA had previously held Khan as part of a special, limited program operated by that agency … in order to help prevent terrorist attacks," and many aspects of the program

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[38] Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, Wash. Post (Jan. 14, 2009) at A1 (quoting military prosecutor saying "We tortured Mohammed al-Qahtani").

[39] *See* Pet'r's Opp'n to Mot. for Recon., *Al Qahtani v. Biden*, No. 05-cv-1971 (D.D.C Feb. 26, 2021) (ECF No. 412) at 3–5 (noting *inter alia* that in 2002 the "FBI observed behaviors consistent with psychosis, such as 'talking to non-existent people, reporting hearing voices,' and 'crouching in a corner of the cell covered with a sheet for hours on end.'").

remained classified.[40] In support of its opposition to counsel access, the government provided a sworn declaration by a CIA information-review officer that stated it was "imperative" to limit Khan's access to counsel because access "could prevent the CIA from obtaining vital intelligence that could disrupt future planned attacks," and because "it is likely he will possess, and may be able to transmit to counsel" top secret classification materials.[41] All of this speculation proved to be untrue.

After nearly a year, Khan was finally permitted to meet with CCR attorneys in October 2007, which caused no damage to national security. Details concerning Khan's torture were also later revealed publicly in the Senate intelligence committee's report on the CIA program—including disclosure that Khan was sodomized in CIA detention—without causing damage to national security. Moreover, as with the government's since-retracted claim that Abu Zubaydah was a member of Al Qaeda, the Senate report concluded that the CIA's claims about the effectiveness of the torture program in gathering intelligence and disrupting terrorist plots were patently false and misleading.[42]

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[40] *Khan v. Bush*, No. 06-cv-1690 (RBW) (D.D.C. Oct. 26, 2006) (ECF No. 6) at 3–4.

[41] *Id*. ECF No. 6-1 at ¶¶ 13, 15, 16.

[42] U.S. Senate, Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (S. Rept. 114-8) at 89 (2014) ("Truthfully, though, I don't recall that the WB [waterboard] produced anything actionable in AZ [Abu Zubaydah] any earlier than another technique might have.").

In the end, contrary to the government's initial blanket invocation of classified information and threatened harms to the United States, affording Khan access to counsel and an adversarial process in a military commission produced a fair an orderly result: in February 2012, Khan pled guilty to certain offenses and agreed to cooperate and provide his assistance to U.S. authorities.

### c. Military Processes and Judgments Were Rife with Bureaucratic Incompetence and Bad Faith.

Central to its claimed entitlement to be free from judicial review of Guantánamo detentions—as the U.S. government again asserts to shut down Zubaydah's suit—is a confidently asserted executive expertise in handling sensitive classified materials and making military-style judgments. Yet once the military's administrative CSRT process—and correspondingly uniform decisions to find individuals detainable—was subject even to nominal scrutiny, the military revealed itself to have no *bona fide* expertise in judgment, to have acted in bad faith, and to have otherwise displayed considerable bureaucratic incompetence.[43] Substantively, the process authorized detention of anyone—regardless of knowledge or intent—whom the executive believed "was part of or supporting Taliban or Al Qaeda forces," a definition so elastic that the government had to concede in a post-*Rasul* hearing that it permitted the detention of "[a] little old lady in Switzerland who writes checks to

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[43] *See, e.g.,* Mark Denbeaux et al., *No-Hearing Hearings: CSRT: The Modern Habeas Corpus*?, at 37–39 (Nat'l Sec. & For. Rel. Law Journal 2006).

what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities."[44]

The military used the CSRT process to put on show trials. Among the among the "myriad deficiencies" this Court found with the CSRT process, *Boumediene*, 553 U.S. at 729, detainees were presumed to be "enemy combatants" and left somehow to disprove this determination even where, as in the majority of cases, classified evidence not shared with the detainee formed the basis of the "enemy combatant" designation. This produced innumerable darkly absurd exchanges between the manufactured tribunal and a detainee thousands of miles from home.[45] CSRTs ultimately did what they were constructed to do: find that the government's secretive determination was in fact correct in 534 of 572 cases—a 93% confirmation rate.[46]

The show trials also produced absurd results. As described above, Murat Kurnaz's classified file revealed the U.S. government knew him to be innocent of any terrorist connections, but such conclusively

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[44] *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

[45] For example, one detainee was told that "[a]n al Qaida leader said he knew you at a terrorist training camp." But when the detainee asked who made the allegation, the Tribunal President responded that "[t]he only information we have is that he is a leader. This Tribunal doesn't have his name. It is not available to you in the unclassified." The Office of the Sec'y of Def. & Joint Staff, *Testimony of Detainees Before the Combatant Status Review Tribunal*, Set 21, 1645–88, at 1659, 1661.

[46] Carol D. Leonnig, *Evidence of Innocence Rejected at Guantanamo*, Wash. Post, Dec. 5, 2007.

exculpatory evidence was not provided to Kurnaz at his hearing. Given this predicate procedural defect, the CSRT was unconstrained in simply *making up* out of thin air the public charges against him. Kurnaz was a Turkish national, and his CSRT panel concluded that a Turkish friend from his German hometown, Selcuk Bilgin "engaged in a suicide bombing" that occurred in Istanbul in 2003, two years into Murat's incommunicado detention.[47] Setting aside the astonishing legal proposition that an individual can face lifetime detention based on totally unknown and unknowable actions of an acquaintance thousands of miles away, it was factually preposterous. His habeas lawyers were able to instantly show that the suspected suicide bomber, Bilgin, was alive and well and under no suspicions by German authorities.[48] And, since the review scheme contemplated by the DTA and MCA, the factual determinations of the CSRT are taken as true, and foreclose independent evidence, there would have been no judicial review of this lie promulgated by the military to its umbrella assertion of superior institutional competence.

Whistleblower testimony of Lieutenant Colonel Stephen A. Abraham, "a long-time military-

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[47] Declaration of James R. Crisfield Jr. at 11, *Karnaz [sic] v. Bush*, No. 04-1135, Dkt. 25-1 (D.D.C. Oct. 18, 2004).

[48] *See* Richard Bernstein, *One Muslim's Odyssey to Guantánamo*, N.Y. Times, June 5, 2005, § 1, at 12 (reporting that Bilgin suicide bomber allegations are untrue); *see also* The Office Transcripts and Certain Documents from Admin. Review Bd. (ARB) Round One, Set 5, 20000–254, at 20080, (affidavit of Bilgin swearing that he is alive and has not undertaken any suicide bombing); *id*. at 20084, (letter of local German prosecutor attesting that Bilgin suicide bomber charges are obviously false).

intelligence officer," confirmed that CSRTs sometimes operated in bad faith. He explained that evidence provided to the CSRT panels on which he served "lacked even the most fundamental earmarks of objectively credible evidence"[49] and that the CSRTs worked from a pre-ordained determination of guilt:

> When our panel questioned the evidence, we were told to presume it to be true. When we found no evidence to support an enemy-combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course ... a new panel was selected that reached a different result.[50]

Nominal legal process—even short of the full adversarial hearings the habeas petitioners sought—revealed that the government's asserted entitlement to exclusive executive prerogative and superior institutional expertise was undeserved and that the judicial function is essential to check against executive error and malfeasance. That process strengthened our democratic institutions without causing any harm (beyond harm to the nation's credibility) to national security.

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[49] Reply to Opp'n to Pet. for Reh'g app. at vi, *Al Odah v. United States*, No. 06-1196 (Jun. 22, 2007).

[50] Statement of Lieutenant Colonel Stephen Abraham, U.S. Army Reserve, *Upholding the Principle of Habeas Corpus for Detainees, Before the House Armed Services Committee* (Jul. 26, 2007).

## B. OTHER EXAMPLES OF EXECUTIVE OVERCLASSIFICATION AND EXAGGERATION CAUSED SERIOUS HARM

### 1. Deaths at Guantánamo

On June 10, 2006, the government reported the first deaths of detainees at Guantánamo, of three men—Salah Al Salami, Yasser Al Zahrani, and Mani Al Utaybi. The government reported the deaths as suicides by hanging.[51] Senior government officials offered additional color, calling the deaths "asymmetric warfare" and "a good PR move," and comparing all Guantánamo detainees to Nazis during World War II.[52] Apart from cursory, self-serving statements characterizing the detainees and the deaths, the government offered no information to the public, habeas counsel, or their families. It ignored requests from medical experts retained by the families to conduct independent autopsies and to release information about the condition of the bodies when returned home—with scars and injuries. It opposed counsel's efforts in habeas proceedings to preserve evidence relating to the cause and circumstances of the deaths.[53] And it opposed FOIA litigation counsel brought after a year of

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[51] Sgt. Sara Wood, *DoD Identifies Guantanamo Detainee Suicides*, Am. Forces Press Serv. (June 12, 2006).

[52] *See id.*

[53] Respt's Opp. to Petr's Mot. for Preservation Order, *Al Salami v. Bush*, No. 05-cv-2452 (PLF), Doc. No. 20 (D.D.C. filed June 29, 2006).

repeated, failed attempts for information about the deaths, citing a list of national security exemptions.[54]

Ultimately, after pressure from litigation and mounting domestic and international concern, and over two years after the deaths were reported, the government finally released the results of its investigations—thousands of pages of material it had previously adamantly maintained could not be disclosed without undue harm.[55] To be sure, the records were riddled with inconsistencies and raised additional serious questions about a cover-up of the full circumstances surrounding the deaths, but the lesson still stood—the government's reflexive demand for total secrecy about the treatment and deaths of Al Salami, Al Zahrani and Al Utaybi was neither necessary nor tenable.

### 2. Hunger Strikes

Widespread hunger strikes by detainees to peacefully protest their conditions and their indefinite detention, and the corresponding government attempts to suppress information about them, have been a feature of the prison from its earliest days. Though there were organized hunger strikes as early as 2002 and 2005, for example, which the government diminished

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[54] Defs' Mot. for Summary Judgment, *Dickstein Shapiro, LLP v. U.S. Dep't Defense, et al.*, No. 08-cv-226 (PLF), Doc. No. 13 (D.D.C. filed Aug. 22, 2008).

[55] *See* Mark Denbeaux et al., *Death in Camp Delta*, Seton Hall University School of Law, Center for Policy & Research (Dec. 7, 2009).

or denied,[56] perhaps the most significant hunger strike at Guantánamo occurred throughout 2013.

From February to March 2013, after more than two years without a prisoner release, Guantánamo prisoners began reporting that the overwhelming majority of the 166 prisoners there at the time were again on hunger strike to protest their indefinite imprisonment. [57] Yet, the head of Southern Command would only concede that 24 prisoners were on "hunger strike light," showing the government's penchant for both denial and word games.[58] The day he made that comment, eight prisoners were already being tube-fed.[59] The next month, the government would detail a "40 strong medical back up team"[60] to oversee the hunger strike as the number of prisoners refusing food would reach a high of 106 in July 2013, 46 of whom were being force-fed with tubes through the nose and into their stomachs, in restraint chairs.[61] After the official narrative was overtaken by mutually-reinforcing reports from prisoners that painted a picture of despair at Guantánamo—and in the process rekindled longstanding outrage about the prison—the

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56 *See generally* Center for Constitutional Rights, The Guantanamo Prisoner Hunger Strikes and Protests (2005).

57 Paul Harris, *Guantánamo hunger strike much bigger than reported, rights group claims*, The Guardian Mar. 21, 2013.

58 *Id.*

59 Lazaro Gamio & Carol Rosenberg, *Guantanamo: Tracking the Hunger Strike*, Miami Herald, Dec. 2. 2013.

60 Matt Williams, *Guantanamo Bay hunger strike prompts arrival of medical back-up*, The Guardian, Apr. 29, 2013.

61 Paul Harris, *Guantánamo doctors must refuse to force-feed hunger strikers—physicians*, The Guardian, Jun. 12, 2013.

government imposed a total information blackout on the number of hunger strikers[62] and, as if to wish them away, darkly rebranded their protest "long term non-religious fasting."[63]

This was a cynical turn of phrase given the effects of hunger striking on CCR client, Tariq Ba Odah. By 2014, Ba Odah's weight hovered at roughly 74 pounds and yet the government undercut its own preparations for his release by withholding his potentially scandalous medical records from prospective recipient countries under the cynical pretext of protecting his privacy. As one would expect given that it might hasten his freedom, Mr. Ba Odah had knowingly provided written consent for their release through counsel.[64]

### 3. Secrecy Around "Targeted Killing" Law and Policy

The government's reflexive attempt to preclude even nominal scrutiny of its actions extends beyond the detention context, to its "targeted killing" policy and classification of information about even the legal and policy dimensions of its actions. In the initial years of the government's controversial use of lethal force against suspected terrorists outside recognized battlefields, through covert drone strikes, it gave little more than broad assurances and outlines addressing

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62 *Guantanamo detainees' hunger strikes will no longer be disclosed by U.S. military*, Associated Press, Dec. 4, 2013.

63 Phil Stewart, *U.S. calls Guantanamo hunger strikes 'non-religious fasting,'* Reuters, Mar. 12, 2014.

64 Charles Levinson and David Rhode, *Special Report: Pentagon thwarts Obama's effort to close Guantanamo*, Reuters, Dec. 28, 2015.

the legality of its actions,[65] fighting FOIA requests for meaningful information and disclosing little about the legal and policy bases for the strikes, at a time when thousands of deaths were being reported, including of several American citizens.[66] Ultimately, and only through the pressure of litigation and public advocacy, the government was compelled to be transparent about at least some of the basics of its policy.[67]

### 4. Rendition to Torture

CCR represented Maher Arar, a Canadian citizen who was intercepted by United States officials in September 2002 as he transited through New York en route home to Canada, detained for nearly two weeks without judicial process, and then delivered to Syria to be interrogated under torture, *Arar v. Ashcroft,* 585 F.3d 559, 566 (2d Cir. 2009)—a process euphemistically dubbed "extraordinary rendition."[68] In Syria, Mr. Arar was beaten, whipped with electrical cables,

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65 *See* John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech at the Wilson Center, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (Apr. 30, 2012).

66 *See* Bureau of Investigative Journalism, Drone Warfare Database, https://www.thebureauinvestigates.com/projects/drone-war (tallying 172-237 people killed by U.S. strikes in Yemen, and 1992-3113 people killed in Pakistan, up to 2012); Peter Finn & Greg Miller, *Anwar al-Awlaki's family speaks out against his, son's deaths*, Wash. Post, Oct. 17, 2011.

67 *See*, *e.g.*, *ACLU v. Dep't of Justice*, No. 15-cv-1954 (CM), 2016 WL 8259331 (S.D.N.Y. Aug. 8, 2016), *vacated by*, 894 F.3d 490 (2d Cir. 2018) (ordering public release of Presidential Policy Guidance for the use of force outside areas of active hostilities, among other policy documents).

68 585 F.3d at 563–64.

held in an underground grave-like cell, and interrogated relentlessly by Syrian officials asking questions similar to those U.S. officials had asked him before.[69] He was released after a year without charge.[70]

He sued various U.S. officials and the government moved to dismiss on, *inter alia*, grounds of state secrets privilege.[71] The federal courts ultimately dismissed his claims on other grounds related to the purported need to protect secrecy and discretion in the foreign policy and national security realms.[72]

Canada, by contrast, saw no harm in transparency. Following a comprehensive investigation, a specially convened Canadian Commission of Inquiry exonerated Mr. Arar. The Commission's findings were set out in an exhaustive report, certain parts of which the Canadian government tried unsuccessfully to conceal on national security grounds. Some of the unredacted information released under Canadian court order implicated the FBI and CIA. The Canadian government apologized to Mr. Arar and, in 2007, settled Mr. Arar's Canadian civil suit for 10.5 million Canadian dollars, with the Prime Minister urging the United States to "come clean" and acknowledge "the deficiencies and inappropriate conduct that occurred in this case."[73]

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69 *Id.* at 566, 587.

70 *Id.* at 587.

71 *Id.* at 574, 605.

72 *Id.* at 567.

73 Editorial, "*Come clean" on Arar, Harper asks U.S.*, CBC News, Oct. 6, 2006.

In 2007, soon after members of Congress offered a public apology to Mr. Arar during a hearing where he testified via video-link,[74] then-Secretary of State Condoleezza Rice admitted that the U.S. government had mishandled his case.[75] In 2008, the Office of the Inspector General of the Department of Homeland Security issued a Report finding that U.S. officials had determined that Mr. Arar was entitled to protection from torture, and that if sent to Syria, he would likely be tortured, but that decision was later overridden.[76] The Inspector General testified that it was possible that Mr. Arar was intentionally sent to Syria to be interrogated under unlawful conditions.[77]

### C. THE DISTRICT COURTS HAVE DEMONSTRATED EXPERTISE AND COMPETENCE IN MANAGING HABEAS CASES WITHOUT JEOPARDIZING THE GOVERNMENT'S ASSERTED INTEREST IN NATIONAL SECURITY.

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74 House Hearing, 110th Congress – Rendition to torture: The case of Maher Arar – Serial No. 110-118 (Committee on Foreign Affairs) and Serial No. 110-52 (Committee on the Judiciary), Oct. 18, 2007.

75 Editorial, *Rice Admits U.S. Erred in Deportation,* N.Y. TIMES, Oct. 25, 2007.

76 *See* U.S. Dep't of Homeland Sec. Office of Inspector General, *The Removal of a Canadian Citizen to Syria*, OIG-08-18 (March 2008, publicly released June 5, 2008).

77 IG Joint Hearing Transcript, 110th Cong. 56 (Statement of the Honorable Richard L. Skinner, Inspector Gen. of the Dep't of Homeland Security before Subcommittees of the House Foreign Affairs and Judiciary Committees).

In *Boumediene,* this Court again rejected the executive branch's claim to make detention decisions free from judicial scrutiny, finding the DTA's scheme for judicial review inadequate in light of many procedural deficiencies, including the lack of provision for introduction of exculpatory evidence by the detainee. Expressing confidence in the "expertise and competence"[78] in the district courts to resolve undecided substantive and procedural questions, the Court directed the lower courts to provide "meaningful" review in habeas proceedings.[79]

The district courts proved this Court's confidence well placed, ultimately developing a "common law of habeas"[80] to substantively limit the previously unbounded scope of the executive's claim for detention authority[81] and a procedural framework to govern all aspects of the habeas proceedings, including discovery and burdens of proof.[82] Courts managed evidentiary

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78 553 U.S. 723 at 796.

79 *Id*. at 783.

80 *See generally*, Baher Azmy, *Executive Detention, Boumediene, and the Common Law of Habeas*, 95 Iowa L. Rev. 445 (Feb. 2010).

81 *See*, e.*g*. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009), *abrogation recognized sub nom, Uthman v. Obama*, 637 F.3d 400 (D.D.C. 2011); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009).

82 *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (TFH), 2008 WL 4858241 (D.D.C. Nov. 6, 2008), *amended by,* 2008 WL 5245890 (D.D.C. Dec. 16, 2008). Other judges in the district largely adopted Judge Hogan's Case Management Order but made additions or alterations as they saw fit. *See, e.g.*, *Razak v. Obama*, No. 05-1601 (GK), 2009 WL 2222988, at *2 (D.D.C.

(*footnote continued ...*)

matters, by excluding evidence obtained by torture and obviously unreliable hearsay testimony[83] and evaluating the sufficiency of the evidence.[84] In short, the courts did exhibit "expertise and competence" in managing habeas cases without any security breaches or compromises to national security.[85] The district court here, as in the Guantánamo cases, is fully equipped to balance the interests of Abu Zubaydah and the government in the adjudication of his case.

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July 22, 2009) (ordering the government to produce any objects or documents it relied on to justify detention).

[83] *Compare Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 63 (D.D.C. 2009) (rejecting "nine-word hearsay allegation" transmitted without an interpreter and rejecting other evidence "due to the fact that it was elicited at Bagram amidst actual torture or fear of it"), *with Hammamy v. Obama*, 604 F. Supp. 2d 240, 244 (D.D.C. 2008) (granting extra weight to government hearsay document because general allegations were corroborated by Italian law enforcement reporting).

[84] *See, e.g.*, *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685, at *12 (D.D.C. Aug. 21, 2009) (rejecting witness accusation because of a host of "serious credibility problems that undermine the reliability of his statements"), *rev'd by*, 613 F.3d 1102 (D.D.C. 2010); *see also Al Rabiah v. United* States, 658 F. Supp. 2d 11, 15 (D.D.C. Sept. 17, 2009) (describing the evidentiary record as "surprisingly bare" and granting habeas).

[85] *See* Azmy, *Common Law of Habeas*, 95 Iowa L. Rev. at 537. That the D.C. Circuit, which has expressed open hostility to this Court's *Boumediene* decision, *see* Stephen I. Vladeck, *The D.C. Circuit after Boumediene*, 41 Seton Hall L. Rev. 1451, 1455–56 (2011), has chosen to override much of the district court's adjudication in no way weakens the lesson about the competence of the district courts to carefully manage cases assertedly implicating national security.

## CONCLUSION

The history of U.S. post-9/11 policy and practice, resulting in the rendition, torture, abuse and ongoing detention of so many Muslim individuals, should caution this Court to withhold deference to the government's traditionally reflexive, overbroad claim that national security concerns and the need for secrecy defeat recourse to judicial review. This history and the essence of the judicial role in our separation-of-powers system requires the Court to draw the distinction between the legitimate exercise of the government's prerogative to conceal sensitive information and its demonstrated pattern of avoiding accountability from the survivors—like Abu Zubaydah here—of its misjudgments and abuse.

August 20, 2021

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