



THE GREAT WRIT

ARTICLE I, SECTION 9, CLAUSE 2: HABEAS CORPUS

RECOMMENDED GRADE/ABILITY LEVEL: 11th-12th Grade

RECOMMENDED LESSON LENGTH: One 50 minute class period

ESSENTIAL QUESTION: When does a negative right become a right and, in the case of Habeas Corpus, to whom and in what cases does this right extend?

OVERVIEW: In addition to the rights protected by the Bill of Rights, there are also a great deal of rights inherent to the Constitution itself, including the right to Habeas Corpus relief, created via a negative right.

In this lesson, students will explore the history and purpose of the Habeas Corpus clause in the Constitution. In consideration of past and present caselaw concerning the application of Habeas Corpus (emphasizing issues of national security and separation of powers), students are tasked with the job of considering the question: When is a writ a right? To whom and in what cases can it extend?

MATERIALS:

- 1. Article:** You Should Have the Body: Understanding Habeas Corpus by James Landman (Appendix A)
- 2. Worksheet:** 5 Ws of the Writ of Habeas Corpus (Appendix B)
- 3. Prezi:** The Great Writ: Habeas Corpus Prezi (found at: http://prezi.com/atlg7huw-adg/?utm_campaign=share&utm_medium=copy)
- 4. Document:** Supreme Court Decision of Boumediene v. Bush (Appendix C) [High challenge text]
- 5. Document:** United States Circuit Court of Appeals, Second Circuit Decision: Bradley v. Watkins (Appendix D) [Middle challenge text]
- 6. Document:** Ex. Parte Merryman (Appendix E) [Challenge text]
- 7. Article:** Constitution Check: Is the president's power to detain terrorism suspects about to lapse? by Lyle Denniston (Appendix F)
- 8. Protocol:** Decoding a Court Opinion (Appendix G)

OBJECTIVES:

- Students will be able to define Habeas Corpus and locate it within the Context of the U.S. Constitution.
- Students will be able to explain the connection to/an issues of Habeas Corpus and Separation of Powers.



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- Students will be able to recognize and identify the connection to questions of Habeas Corpus in the cases of Ex. Parte. Merryman (1861), Bradley v. Watkins (1947), and Boumediene v. Bush (2008)
- Students will be able to take and defend a position on the present application of Habeas Corpus.

STANDARDS:

CCSS.ELA-LITERACY.RH.11-12.2

Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-LITERACY.RH.11-12.9

Integrate information from diverse sources, both primary and secondary, into a coherent understanding of an idea or event, noting discrepancies among sources.

CCSS.ELA-LITERACY.RH.11-12.7

Integrate and evaluate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, as well as in words) in order to address a question or solve a problem.

CCSS.ELA-LITERACY.RH.11-12.10

By the end of grade 12, read and comprehend history/social studies texts in the grades 11-CCR text complexity band independently and proficiently.

LESSON OUTLINE

BACKGROUND INFORMATION: To best understand the type of right discussed in this lesson, students should have completed previous study with the Bill of Rights. To understand some of the Constitutional historical background for Habeas Corpus, students need to have studied the Founding era including the Constitutional Convention and Ratification Debates. Students also need a basic understanding of the Judiciary and familiar with reading and interpreting court opinions.

LESSON PREPARATION:

Consider pre-highlighting and annotating at least two of the three cases; grouping students according to their readiness for these texts .

- Boumediene v. Bush is a high challenge text that should be supported with guiding highlights.
- Bradley v. Watkins is a Middle Challenge text could be highlighted to guide readers.
- Ex. Parte Merryman is a challenge text that should be highlighted for key concepts and terms.

Print or make available online:

- The 5 Ws worksheet & Landman reading (pre-lesson reading)
- The jigsaw court cases & Decoding a Court Opinion protocol (for in class work),
- Lyle Denniston Article (Optional supportive reading)

PRE-LESSON READING: Prior to this lesson, students should complete a quick read and annotation of the article, “You Should Have the Body: Understanding Habeas Corpus,” by James



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Landman. In this quick read through, students should choose one of the 5 Ws on the **5 Ws worksheet** and annotate the text accordingly.

ANTICIPATORY ACTIVITY/BELL-RINGER: [Before students arrive, write essential question on board] As students arrive, instruct them to take out their pocket constitutions (or search any copy of the Constitution available to them) and locate the Habeas Corpus clause and read it. This is an independent activity.

IN-CLASS ACTIVITIES:

1. Instruct students to take out their reading from last night and the 5 Ws worksheet. Students can use the sheet to guide their notetaking in class.
2. 15 minute interactive lecture on the purpose and history of Habeas Corpus and the contention that surrounds its application. Use the provided Prezi to guide a in-depth review of the Landman text read as homework (the information provided on the Prezi is only a guide, you or students are meant to add to the Prezi as you proceed through the text). As you proceed through Prezi, use the provided primary source excerpts to enrich student understanding of the Writ. Additionally, ask for student volunteers for each of the 5 Ws to pull out information from the text.
3. For 15 minutes, divide students into groups of three and assign each student one of the three court cases, which they read and annotate individually, using the Decoding a Court Opinion Protocol found in Appendix G. Once students complete the reading, students with the same cases will meet together (jigsaw style) to share their findings.
 - a. As students read and share their cases, they should seek to highlight: the facts of the case; the constitutional question; the court's decision; and, how Habeas was applied in the case.
 - b. **Student need not understand all the details of each case to be able to identify the key constitutional question and analyze how Habeas was used. The Protocol is a guide for students but may not be useful for all students.**
4. For 15 minutes, students return to their groups of three and join with another group of three, sharing their cases and using their findings to produce a visual representation of Habeas Corpus with regards to the essential question (this can take the form of a drawing, diagram, graph, cartoon, etc). Have students present these to the class, time-permitting.

WRAP-UP: Offer students at least a 3 min draft time for their homework (see below). Optional: Give students 2 minutes to complete an exit slip containing: something they learned, a remaining question, and/or anything which may have disrupted their learning in class.

OUT-OF-CLASS ASSESSMENT:

HOMEWORK: Students can choose to read the Constitution Daily article from Lyle Denniston **OR** use an online media platform (classroom blog, discussion board, Facebook page, etc) to post response to the prompt:

Habeas corpus is one of few rights enumerated by the Constitution that has a built in fail-safe, meaning that it can be suspended. If we interpret the Constitution as protecting a right to Habeas relief, what makes it different from the rights enumerated in the Bill of Rights? If Habeas can be suspended, does that mean other rights can be suspended in the interests of national security? Try on this perspective to consider which other rights might constitutionally be argued as



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suspendible in times of war. Compose your response and respond to at least one of your classmates.

EXTENSIONS:

- * **Write:** Following the habeas corpus clause in the constitution are clauses prohibiting bills of attainder and ex post facto laws. What are bills of attainder and ex post facto laws? Can these too be considered rights protected by the constitution? Are there any limits to these rights?

- * **Primary Source Investigation:** A privilege or a right? By including a prevention of undue habeas suspension, did the Founding fathers intent to create a right to Habeas relief or was Habeas considered a privilege? Based on your findings, what implications does this treatment of habeas have on the current application of the Writ? Consider this question with regards to other rights found in the Constitution and Bill of Rights.

- * **Debate:** Where do we draw the line between what is essential for our nation's security and what takes our protection too far? Can Habeas Corpus be suspended? If so, who can suspend it?

Additional Resources:

- **Library of Congress' Magna Carta: Muse & Mentor digital exhibit** (found at: <http://www.loc.gov/exhibits/magna-carta-muse-and-mentor/writ-of-habeas-corpus.html>)
 - This is a digital exhibit of primary sources charting the development of Habeas Corpus and provides a great deal of resources that could be useful in modifying this lesson to take on the "exclusionary" side of Habeas Corpus case law.
 - pp 119-123 in **Akhil Reed Amar's America's Constitution: A Biography** (Random House, 2005)
 - I found these pages useful to better understand the Constitutional background for Habeas concerning national security, separation of powers, and state's rights.
 - pp166-168 in **Howard Fineman's The Thirteen American Arguments** (RANDOM House, 2008)
 - Within a chapter on Presidential power, I found these pages providing a nice overview of the historical narrative on expansion of Presidential power, useful when discussing the difficulties we confront when considering who has sovereignty over the Writ of Habeas Corpus
- Constitution Daily's **Constitution Check: Is the president's power to detain terrorism suspects about to lapse?** (Lyle Denniston, 9/4/14)
 - A quote from this article is used in the lecture Prezi and supports a discussion on the nature of citizenship, separation of powers, rights of the executive, and checks and balances alongside Habeas arguments. It is a worthwhile supportive read but would also be an excellent optional reading assignment or required reading prior to the homework blogging assessment. The full text and url are provided in the appendix.

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APPENDIX A

You Should Have the Body: Understanding Habeas Corpus
by James Landman

URL: http://www.americanbar.org/content/dam/aba/images/public_education/05_mar08_habeascorpus_landman.pdf

You Should Have the Body: Understanding Habeas Corpus

James Landman

English legal commentator William Blackstone described the writ of habeas corpus as a second Magna Carta, and Supreme Court Chief Justice John Marshall called it the “great writ.” It has been part of the Anglo-American common law tradition since the Middle Ages. In the United States, it has been a source of tension between state and federal courts, and a point of controversy with respect to the separate powers of the legislative, executive, and judicial branches. It is very much in the news today as the Supreme Court considers whether the writ of habeas corpus is available to the detainees at Guantanamo Bay, Cuba.

The basic purpose of the writ of habeas corpus is to afford a person who has been detained the chance to challenge the legality of his or her detention. The writ has a rich and varied history, and the scope of the writ has changed over the centuries of its use. This article looks at the origins of the writ, its development in English and American law, and current points of controversy regarding the writ.

Origins of the Writ in English Law

The writ of habeas corpus has its origins in the early common law courts of medieval England. Some legal historians have found a reference to the writ in Article 39 of the Magna Carta, which in 1215 provided that “no Freeman shall be taken, or imprisoned ... but by lawful Judgment of his Peers, or by the Law of the Land.” Whether this refers to the writ of habeas corpus (or something like it) is disputed, but the prohibition against unlawful imprisonment or detention has always been at the heart of the writ.

In the medieval courts, writs of habeas corpus had several purposes, and took many forms. A writ was simply a written order of a court ordering someone to do something. Many of these writs involved a *corpus* (the Latin term for “body”), directing the person who had control of the body in question to appear in court for the purpose stated in the writ (the term *habeas corpus* means “you should have the body”). Thus, a medieval sheriff might receive a writ of *habeas corpora juratorum* (ordering him to appear in court with the bodies of potential jurors) or a writ of *habeas corpus cum causa* (ordering him to appear in court with the body of a prisoner “with cause” for the prisoner’s confinement). The modern habeas writ developed from the writ of *habeas corpus ad subjiciendum*, which directed the person detaining a prisoner to produce the body of the prisoner with the reason for the detention, ready to submit (*ad subjiciendum* means “for submitting”) to whatever the court ordered with respect to the prisoner. If the court found that the prisoner

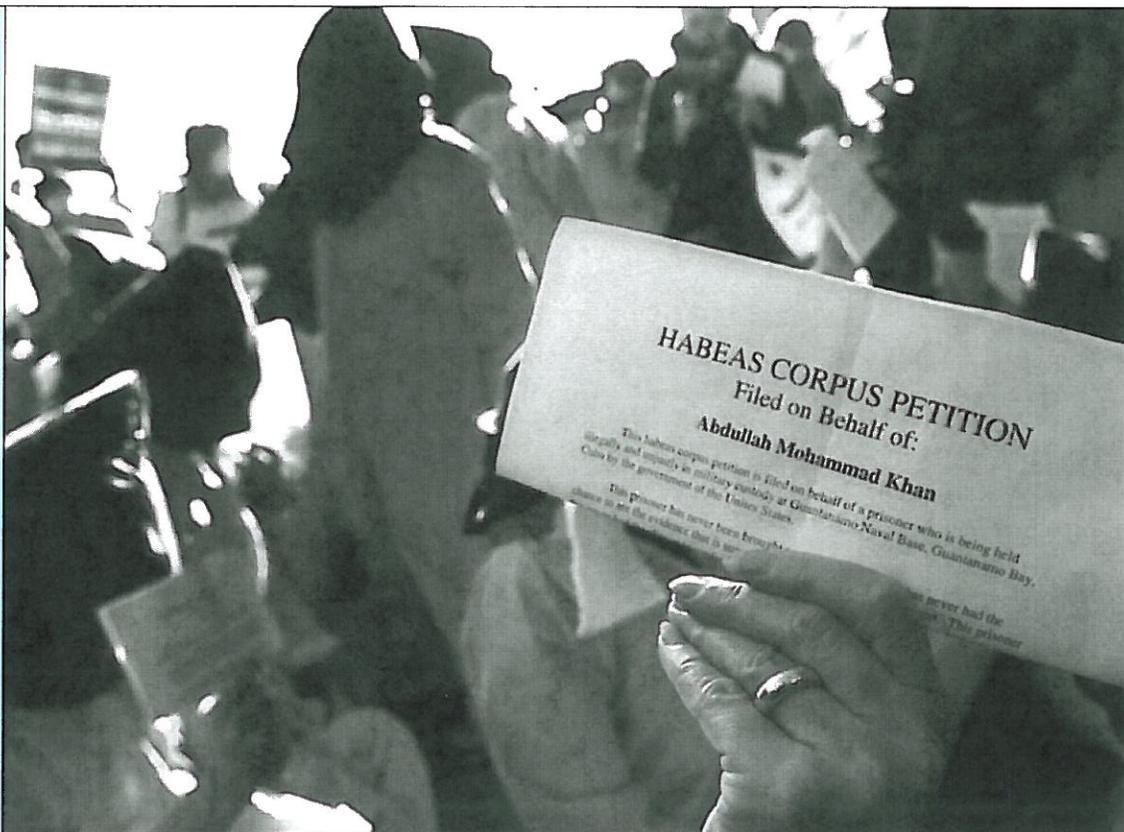
was being held without cause, it could order his or her release.¹

The medieval courts that issued writs of habeas corpus were concerned as much with their own jurisdiction as with the liberty interests of the detained prisoner. The two English common law courts—King’s Bench and Common Pleas—had serious jurisdictional competition from ecclesiastical courts, local and manorial courts, and, beginning in the late fourteenth century, the Court of Chancery. The writ of habeas corpus, issued in the name of the court and the king, provided a means for the common law courts to bring a person within the claimed jurisdiction of another court into the jurisdiction of King’s Bench or Common Pleas. The issue of jurisdiction is also important with respect to the English law of habeas corpus because, if a prisoner was imprisoned as a result of conviction by a court of competent jurisdiction, the writ was not available.

The modern understanding of the writ of habeas corpus as a protection of individual liberty solidified in the seventeenth century, amid struggles between Parliament and the monarch for political supremacy. The Petition of Right in 1628 charged that the king’s jailers were ignoring writs of habeas corpus and keeping English subjects illegally detained. In 1641, Parliament passed an act abolishing the Star Chamber, a court controlled by the king and an

Protesters dressed as prisoners from the U.S. detention facility at Guantanamo Bay hold up pretend writs of habeas corpus in the names of actual prisoners during a sit-in at a federal courthouse in Washington, January 11, 2007.

Reuters/Jonathan Ernst (United States)



inner circle of advisors that operated in secret and became an instrument to suppress opposition to the crown. The 1641 act provided habeas relief in the common law courts to any person detained or imprisoned by order of the Star Chamber.

Finally, in 1679 Parliament passed the Habeas Corpus Act. This act addressed delays by sheriffs and jailers in making returns on (i.e., answering) writs of habeas corpus that had been issued by the common law courts on petition of English subjects detained in prison. It imposed strict deadlines on the time available to make a return on the writ and provided for substantial fines for failure to make a timely return. The act also provided that the writ could be directed into “privileged” jurisdictions within England (special jurisdictions where the rules of the common law did not fully apply), and prevented illegal imprisonments “in prisons beyond the seas.” It is this act, which solidified the individual subject’s right to the writ of habeas corpus, that William Blackstone described “as

another Magna Carta of the kingdom” in his eighteenth-century *Commentaries on the Laws of England*.

The Writ of Habeas Corpus in American Law

When the Constitution of the United States was drafted in 1787, the writ of habeas corpus was the only English common law writ given specific constitutional protection. Article I, Section 9 of the Constitution provides that “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it” (this is known as the “Suspension Clause”). Two years later, in the Judiciary Act of 1789, Congress provided that both justices of the U.S. Supreme Court and judges of the federal district courts “have power to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment.” The Judiciary Act limited the writ’s scope only to persons in custody under authority of the federal government or committed to trial in the federal courts. The power of federal

judges to grant the writ did not, in other words, extend to persons detained under authority of the state governments.

Some minor changes were made to the federal courts’ powers to grant writs of habeas corpus in the early decades of the 1800s. With the outbreak of the Civil War, however, habeas issues came to the fore. During the war itself, President Lincoln, ultimately with the support of Congress, ordered widespread suspensions of the writ under authority of the Constitution’s Suspension Clause. Immediately following the war, Congress authorized a broad expansion of the federal judiciary’s habeas powers as part of its Reconstruction efforts.

The Suspension Clause and the Civil War

Following the start of the Civil War in April 1861, Washington, D.C., faced the possibility of being geographically stranded between the declared Confederate state of Virginia and the state of Maryland, which was leaning toward secession. Retaining Maryland, and the vital transportation lines that

ran through it, was essential to the Union. President Lincoln ordered his commanding general, Winfield Scott, to take drastic measures against Maryland citizens acting against the federal government. These included suspension of the writ of habeas corpus, which Lincoln authorized anywhere along the transportation lines running from Philadelphia to Washington. On May 25, 1861, federal authorities entered the home of John Merryman, a Maryland planter, and arrested him on suspicion that he was involved in a plot against the federal government. He was detained at Fort McHenry, outside Baltimore. Lawyers for Merryman soon petitioned Supreme Court Chief Justice Roger Taney (who also sat as a judge on the U.S. Circuit Court of Maryland) for a writ of habeas corpus.²

Lincoln's suspension of the writ of habeas corpus spoke to a central question that is unanswered in the Suspension Clause: namely, who has the power to suspend the writ? Lincoln suspended the writ during what was clearly a time "of rebellion or invasion," but did he have the power as president to do so? The Suspension Clause is in Article I of the Constitution, which generally defines the powers of Congress, and the English history of the writ had positioned it as a tool that Parliament used to limit the executive power of the monarch. Antebellum commentators on the writ, including Supreme Court Justice Joseph Story and Chief Justice John Marshall, had indicated that suspension was a power that lay with the Congress.

Lincoln's own position, and that of his attorney general, Edward Bates, was that the power of suspension was shared by Congress and the president. Suspension of the writ was clearly intended to occur only in times of national emergency. The executive's obligation to uphold the Constitution, especially in times of rebellion, surely encompassed a power to suspend the writ instead of waiting until Congress could convene and pass appropriate legislation. In his war address to Congress on July 4, 1861, Lincoln argued,

The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?

Attorney General Bates, in defense of the president's position, agreed that only Congress could suspend the authority of the federal courts to issue writs of habeas corpus. But, he argued, the executive branch could suspend the privilege of the writ for persons caught in open rebellion against the government. Bates's argument, in other words, was that the president could not prevent the courts from issuing the writ, but could deny a return on the writ for a detained rebel. Bates also noted that the president and the judiciary were coordinate branches of government. He thus did not understand how it would be possible for a judge to order the president to come before the court *ad subijendum*—ready, that is, to submit to whatever the judge decided.

In *Ex parte Merryman*, Chief Justice Taney, sitting as a circuit court judge, argued that President Lincoln had violated the language of the Suspension Clause. Taney had issued the writ of habeas corpus as petitioned by Merryman's lawyers, but was met by the refusal of the federal officers to appear and explain the reasons for Merryman's detention. "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion," Taney asserted, "and that it was admitted on all hands

that the privilege of the writ could not be suspended, except by act of Congress." The president's duty was "to faithfully execute" the laws of the land, including, where necessary, coming to the aid of the judicial authority in execution of laws "expounded and adjudged of" by the judiciary. Contrary to the argument that Attorney General Bates would make on coordinate branches, Taney declared that in exercising his power in aid of the judiciary, the president "acts in subordination to judicial authority, assisting it to execute its process & enforce its judgments."³

But Taney also acknowledged the limitations of the judicial branch in enforcing the writ against executive power. "I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome," Taney wrote. Having filed his opinion with the U.S. Circuit Court for Maryland, and directing that a copy of the opinion be transmitted under seal to President Lincoln, Taney concluded that "[i]t will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected, and enforced."

The legitimacy of Lincoln's actions in suspending the writ, denied by Taney, was implicitly supported by Congress, which later in 1861 passed a statute declaring that all military-related acts that had been taken by the president were legal. In 1863, Congress passed sweeping legislation authorizing the president to suspend the writ for the duration of the war whenever he judged that it was required for the public safety.

The Civil War suspensions of the writ of habeas corpus left unanswered the question of who has power to suspend the writ. Chief Justice Taney issued his opinion in his role as a circuit court judge, so it did not create Supreme Court precedent. President Lincoln relied upon emergency powers to suspend the writ initially, but sought confirmation of the

suspension through legislation passed by Congress.

The year after the Civil War ended, the Supreme Court did offer clarification of its opinion on some habeas issues in *Ex parte Milligan*, 71 U.S. 2 (1866). The *Milligan* case involved a resident of Indiana who had been arrested and detained under the suspension of habeas corpus authorized by Congress in 1863. The Supreme Court held that suspension of habeas corpus did not affect other constitutionally protected rights (such as the right to trial by jury): here, where Milligan was a civilian and a citizen of a state that had not seceded, where regular courts were functioning, Milligan could not legitimately be tried by military commission in lieu of a regular court trial. The Court also held that suspension of the privilege of the writ did not suspend the writ itself, which issues as a matter of course. If the privilege of the writ has been suspended, the issuing court decides upon return of the writ whether the party who petitioned for it is barred from proceeding further.

Reconstruction and Beyond: Extension of Habeas Corpus to the States

Two years after the end of the Civil War, Congress made a significant change to the writ of habeas corpus through the Habeas Corpus Act of 1867. The Act provided,

That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.

The extension of the federal courts' powers to issue writs of habeas corpus "where any person may be restrained of his or her liberty in violation of the Constitution" gave the federal courts

the power to issue writs upon the petition of state prisoners who claimed a violation of their constitutional rights in state judicial processes. Although the legislative history surrounding passage of the act is uncertain, it seems that Congress was motivated in part by a distrust of state officers—judicial and otherwise—in recognizing and enforcing federal rights, including those contained in the Fourteenth Amendment and the civil rights statutes drafted immediately in the wake of the Civil War.⁴

The Habeas Corpus Act was passed the year following the drafting of the Fourteenth Amendment, which added to the Constitution the provision that no state shall "deprive any person of life, liberty, or property, without due process of the law." At the time the Fourteenth Amendment was ratified, and for some time after its ratification, few of the due process rights set forth in the Constitution's Bill of Rights had been held to apply to the states. This began to change over the course of the twentieth century, as most provisions in the Bill of Rights that guaranteed due process and a fair trial were "incorporated"—or held to apply—to the states. State prisoners increasingly took advantage of federal habeas corpus petitions to challenge alleged procedural deficiencies that violated the prisoners' constitutional rights.

The English law of habeas corpus, as it had been adopted by the United States, had provided that the writ was no longer available to prisoners who had been convicted by a court of competent jurisdiction. Early cases protesting due process violations in the states were brought under the theory that these violations voided the jurisdiction of the state courts. As the prisoner had thus not been tried and convicted by a court of competent jurisdiction, the prisoner could still allege that his or her imprisonment was unlawful.

The expansion of federal habeas corpus review of state proceedings reached a high point in a pair of Supreme Court decisions from the 1950s and 1960s. In *Brown v. Allen*, 344 U.S. 433 (1953), the

Supreme Court held that a federal court in a habeas corpus proceeding was not bound by a state judiciary's resolution of a federal constitutional issue, even if the issue had received a full and fair hearing in the state courts. In 1963, the Supreme Court's decision in *Fay v. Noia*, 372 U.S. 391, held that failure to exhaust one's remedies (e.g., appeals) in the state courts would not necessarily foreclose habeas relief in the federal courts, particularly where the failure to exhaust state remedies was not intentional. In this case, the petitioner, Noia, had been convicted of felony murder (involvement in a robbery where an individual was killed) with two other codefendants on the basis of coerced confessions. The state admitted to the coerced confession, but had denied relief because Noia had failed to make a timely appeal of his conviction.

Justice William Brennan, author of the majority opinion in *Fay v. Noia*, appealed to the history of the writ in justifying an expansive power of the federal courts in redressing denials of due process:

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.⁵

The decisions in *Brown* and *Noia* raised serious issues of federalism, greatly increasing the number of post-conviction habeas petitions from state courts and inviting, from the states' perspective, intrusive federal judicial oversight of state criminal justice systems.

Habeas Corpus Today

Before September 11, 2001, attention to habeas corpus focused on the issues arising from federal court review of state judicial decisions. The Supreme Court had, in a number of decisions from the 1970s on, backed away from the expansive readings of federal habeas review evident in *Brown v. Allen* and *Fay v. Noia*. Congress joined this movement away from expansive federal habeas review in 1996, with passage of the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA represented a major effort by Congress to streamline and limit federal habeas review of state court decisions. Its provisions include:

- A one-year deadline within which state prisoners have to file a federal habeas petition.
- A prohibition on federal habeas relief for claims that have already been adjudicated by the state court. The prohibition can be

waived only if the state court decision contradicted, or unreasonably applied, clearly established federal law, as determined by the Supreme Court, or unreasonably determined the facts based on the evidence presented in the state trial.

- Limitations on repetitious petitions for habeas relief. For a second or successive habeas petition to succeed, a three-member panel of a federal court of appeals serves as a “gatekeeper” and must determine that either newly discovered evidence or a newly recognized interpretation of the Constitution clearly establishes that no reasonable factfinder would have found the prisoner guilty. “Gatekeeper” decisions of the court of appeals cannot be appealed to the Supreme Court.

Opponents of capital punishment have been particularly critical of AEDPA,

RESOURCES

The history of *Ex parte Merryman* and President Lincoln’s Civil War suspensions of habeas corpus is part of the Federal Judicial Center’s “Federal Trials and Great Debates in United States History” series. The *Merryman* unit is available for free download by following the “Teaching Judicial History: Notable Federal Trials” link at www.fjc.gov/history/home.nsf.

The ABA Division for Public Education is offering free access to its *Preview of U.S. Supreme Court Cases* article on the Guantanamo Bay detainee habeas cases (*Boumediene v. Bush* and *Al Odah v. United States*) and related resources at www.abanet.org/publiced/preview/guantanamo.shtml.

The BBC provides a comparative perspective on the writ of habeas corpus from the British point of view in its online article, “A Brief History of Habeas Corpus,” available at news.bbc.co.uk/1/hi/magazine/4329839.stm.

The American Civil Liberties Union offers an interactive timeline of the history of habeas corpus at www.aclu.org/safefree/detention/habeastimeline.html.

CELEBRATING

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YEARS

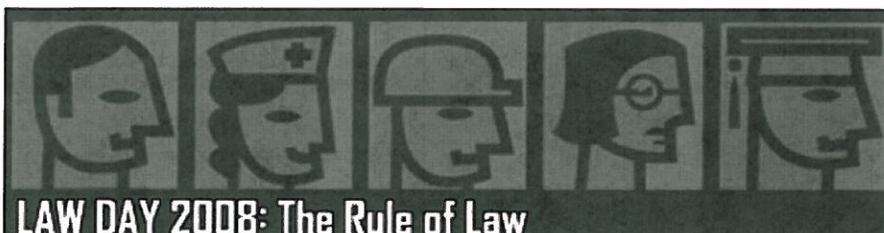
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Habeas Corpus: The Ultimate Right?

The writ of habeas corpus can easily be overlooked in a discussion of the individual rights protected by the Constitution. The writ is described in Article I, which defines the powers of Congress, not in the Bill of Rights. The nature of the right protected by the writ (essentially, one's liberty) is not defined. Instead, the Constitution provides only that the "privilege of the writ ... shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

This activity is designed to better acquaint students with the writ of habeas corpus and consider the relation of the writ to other individual rights protected by the Constitution.

Step One

Write the term *habeas corpus* and its definition ("you should have the body") on the board. Explain to the class that a writ of habeas corpus is a court order directing a person who is holding someone prisoner (the person who "has the body") to come to the court and explain the reason for the imprisonment. If the court finds that the prisoner is being detained unlawfully, it can order that the prisoner be released.

Tell the class that the writ of habeas corpus is often called the "Great Writ." Ask the class to brainstorm why the right to challenge the legality of one's imprisonment is considered such an important right.

Step Two

Remind the class that the Bill of Rights was not part of the original Constitution. Have the class read Federalist Paper No. 84, written by Alexander Hamilton (available at www.yale.edu/lawweb/avalon/federal/fed84.htm). Federalist No. 84 addresses concerns that the Constitution did not contain a bill of rights.

Ask students to focus on the fifth paragraph, beginning "It may well be a question ..." What importance does Hamilton attach to the writ of habeas corpus in this paragraph? How does the writ protect against "the fatal evil" of "confinement of the person"? Why does Hamilton describe illegal confinement as "the fatal evil"? Compare Hamilton's statements in support of the writ to the ideas the class brainstormed in Step One about the importance of the writ.

Step Three

Review with the class the rights provided to criminal defendants in the Bill of Rights, including the Fourth Amendment (search and arrest warrants), Fifth Amendment (rights in criminal cases), and Sixth Amendment (rights to a fair trial). Also review the Fifth and Fourteenth Amendment's guarantees against deprivations of "life, liberty, or property, without due process of law."

Discuss with students the relationship between these rights and the writ of habeas corpus. Brainstorm how the writ of habeas corpus might help to protect the rights guaranteed by the Bill of Rights. Students should understand that the writ of habeas corpus might be sought by a prisoner who was convicted on the basis of illegally seized evidence, a coerced confession, after being denied a right to jury trial, etc.

Step Four

Review Article I, Section 9 of the Constitution (often called the "Suspension Clause"). Note that this clause appeared in the article of the Constitution that defines the legislative branch. Ask students to consider the following questions:

1. Why might the public safety require that the writ be suspended in a time of rebellion or invasion?
2. Based on the language of the Suspension Clause and its placement in Article I, do you think the Constitution gives the power to suspend the writ of habeas corpus to Congress? Imagine that an attack is made on Washington, D.C., and the Congress is unable to convene. Should the president also have the power to suspend the writ? Should the president be required to seek Congress's approval of suspension once Congress is again able to convene?
3. Article III of the Constitution gives the federal courts power over all cases arising under the Constitution. If Congress or the president suspended the writ of habeas corpus, should the federal courts have the power to decide whether the constitutional conditions for suspension ("when in cases of rebellion or invasion the public safety may require it") have been met?
4. (Optional) Review the cases of *Boumediene v. Bush* and *Al Odah v. United States*, pending before the Supreme Court, using the resources at www.abanet.org/publiced/preview/guantanamo.shtml. Discuss the roles of the three branches and the Suspension Clause in these cases.

Step Five

Close your review of habeas corpus by discussing with students why the writ of habeas corpus remains important today. You may want to share with students the last section of the accompanying article ("Habeas Corpus Today"), which focuses on habeas corpus in state capital punishment cases and the Guantanamo Bay detainee cases.

and of other efforts to restrict federal habeas review. Delays in the execution of state capital punishment sentences while convicted prisoners pursued federal habeas review have long been a source of frustration for the states. The finality of capital punishment, however, and the inability to correct an erroneously executed death sentence has been cited in favor of maintaining a generous policy toward federal habeas review of capital cases. In an early challenge to the constitutionality of AEDPA, however, involving a death penalty convict from Georgia who failed to persuade a “gatekeeping” court of appeals to permit him to file a second federal habeas petition, the Supreme Court upheld the law. The scope of the writ, the Court argued, is subject to statutory definition by the legislature. AEDPA did not suspend the writ, in violation of Article I, Section 9, but placed acceptable restraints on the writ’s scope.⁶

Suspension issues have arisen again in recent years with respect to the use of the writ by detainees at Guantanamo Bay, Cuba. The three major cases involving Guantanamo detainees that have come before the Supreme Court—*Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Hamdan v. Rumsfeld*—have all been initiated through filings of petitions for the writ of habeas corpus in the federal courts. Two of those cases have resulted in rulings that go specifically to the scope of habeas. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), held that U.S. citizens have the right to contest their detention as enemy combatants before a neutral decision maker, while *Rasul v. Bush*, 542 U.S. 466 (2004), held that the federal judiciary’s habeas jurisdiction extends to aliens held in territory over which the United States holds full and exclusive jurisdiction, if not “ultimate sovereignty” (the U.S. naval base at Guantanamo Bay is on Cuban soil, but is occupied by the United States under a long-term lease with Cuba).

The Supreme Court’s most recent detainee decision in *Hamdan v. Rumsfeld*, Docket No. 05-184 (2006), held that Congress had not given the executive

branch authority to try detainees at Guantanamo Bay in special military tribunals. In response to the *Hamdan* decision, Congress passed the Military Commissions Act of 2006. In addition to authorizing the use of military commissions to try detainees, the act provides that no federal court shall have jurisdiction to consider an application for a writ of habeas corpus filed by an alien who is being detained as an enemy combatant or is awaiting determination of enemy combatant status.

The Military Commissions Act’s suspension of habeas with respect to alien detainees has now been challenged before the Supreme Court in the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*, which were argued before the Court in December 2007, and should be decided by June 2008. The decision will likely revisit the *Rasul* decision on availability of the writ to aliens held at Guantanamo. It should also consider Congress’s right to suspend the writ with respect to alien detainees, as well as the detainees’ own right to assert a claim based on the Constitution’s Suspension Clause.

The scope of the writ of habeas corpus has undeniably expanded over the course of its more than 700-year history, yet the proper scope of the writ remains contested. We may well be in the midst of another transformative period for the writ—one that may contract the writ’s scope—as both the AEDPA and the Guantanamo detainee cases continue to shape the nature and the history of the writ today. ■

Notes

1. A list of different English common law habeas corpus writs is provided in Charles Doyle’s “Federal Habeas Corpus: A Brief Legal Overview” (Congressional Research Service, Library of Congress, April 26, 2006), pages 2-3.
2. This account of the Merryman case is adapted from Bruce Ragsdale, *Ex parte Merryman and Debates on Civil Liberties During the Civil War* (Washington, D.C.: Federal Judicial Center, 2007).
3. *Ibid.*, 34.

4. For a discussion of the legislative history of the 1867 Habeas Corpus Act, see Stephen A. Saltzburg, “Habeas Corpus: The Supreme Court and the Congress,” *Ohio State Law Journal* 44 (1983): 367-391.
5. *Fay v. Noia*, 372 U.S. 391 (1963), 401-402.
6. See *Felker v. Turpin*, 518 U.S. 1051 (1996).

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THE GREAT WRIT

APPENDIX B

The Great Writ: The 5 Ws Worksheet

NAME _____

DATE _____

PERIOD _____



THE GREAT WRIT

HABEAS CORPUS

WHAT

...is the Writ of Habeas Corpus?

...is unique about this “right”?

WHERE

...is Habeas applied?

...is Habeas mentioned in the Constitution?

...does the writ originate?

WHEN

...is a writ of Habeas Corpus invoked?

...has Habeas been used?

...has Habeas been challenged?

WHO

...does the writ apply to?

...can exercise the writ?

WHY

...is the writ present in the constitution?

...do we continue to struggle with its application?

...does Habeas appear in Article I instead of the Bill of Rights? Does this change the way we consider Habeas as a "Right"?



THE GREAT WRIT

APPENDIX C

Supreme Court Decision of Boumediene v. Bush (2008)

URL: <https://supreme.justia.com/cases/federal/us/553/723/>

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**BOUMEDIENE ET AL. v. BUSH, PRESIDENT OF THE
UNITED STATES, ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 06–1195. Argued December 5, 2007—Decided June 12, 2008*

In the Authorization for Use of Military Force (AUMF), Congress empowered the President “to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . on September 11, 2001.” In *Hamdi v. Rumsfeld*, 542 U. S. 507, 518, 588–589, five Justices recognized that detaining individuals captured while fighting against the United States in Afghanistan for the duration of that conflict was a fundamental and accepted incident to war. Thereafter, the Defense Department established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at the U. S. Naval Station at Guantanamo Bay, Cuba, were “enemy combatants.”

Petitioners are aliens detained at Guantanamo after being captured in Afghanistan or elsewhere abroad and designated enemy combatants by CSRTs. Denying membership in the al Qaeda terrorist network that carried out the September 11 attacks and the Taliban regime that supported al Qaeda, each petitioner sought a writ of habeas corpus in the District Court, which ordered the cases dismissed for lack of jurisdiction because Guantanamo is outside sovereign U. S. territory. The D. C. Circuit affirmed, but this Court reversed, holding that 28 U. S. C. §2241 extended statutory habeas jurisdiction to Guantanamo. See *Rasul v. Bush*, 542 U. S. 466, 473. Petitioners’ cases were then consolidated into two proceedings. In the first, the district judge granted the Government’s motion to dismiss, holding that the detainees had no rights that could be vindi-

*Together with No. 06–1196, *Al Odah, Next Friend of Al Odah, et al. v. United States et al.*, also on certiorari to the same court.

Syllabus

cated in a habeas action. In the second, the judge held that the detainees had due process rights.

While appeals were pending, Congress passed the Detainee Treatment Act of 2005 (DTA), §1005(e) of which amended 28 U. S. C. §2241 to provide that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo,” and gave the D. C. Court of Appeals “exclusive” jurisdiction to review CSRT decisions. In *Hamdan v. Rumsfeld*, 548 U. S. 557, 576–577, the Court held this provision inapplicable to cases (like petitioners’) pending when the DTA was enacted. Congress responded with the Military Commissions Act of 2006 (MCA), §7(a) of which amended §2241(e)(1) to deny jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants, while §2241(e)(2) denies jurisdiction as to “any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of a detained alien determined to be an enemy combatant. MCA §7(b) provides that the 2241(e) amendments “shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date . . . which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained . . . since September 11, 2001.”

The D. C. Court of Appeals concluded that MCA §7 must be read to strip from it, and all federal courts, jurisdiction to consider petitioners’ habeas applications; that petitioners are not entitled to habeas or the protections of the Suspension Clause, U. S. Const., Art. I, §9, cl. 2, which provides that “[t]he 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”; and that it was therefore unnecessary to consider whether the DTA provided an adequate and effective substitute for habeas.

Held:

1. MCA §7 denies the federal courts jurisdiction to hear habeas actions, like the instant cases, that were pending at the time of its enactment. Section §7(b)’s effective date provision undoubtedly applies to habeas actions, which, by definition, “relate to . . . detention” within that section’s meaning. Petitioners argue to no avail that §7(b) does not apply to a §2241(e)(1) habeas action, but only to “any other action” under §2241(e)(2), because it largely repeats that section’s language. The phrase “other action” in §2241(e)(2) cannot be understood without referring back to §2241(e)(1), which explicitly mentions the “writ of habeas corpus.” Because the two paragraphs’ structure implies that habeas is a type of action “relating to any as-

Syllabus

pect of . . . detention,” etc., pending habeas actions are in the category of cases subject to the statute’s jurisdictional bar. This is confirmed by the MCA’s legislative history. Thus, if MCA §7 is valid, petitioners’ cases must be dismissed. Pp. 5–8.

2. Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause’s protections because they have been designated as enemy combatants or because of their presence at Guantanamo. Pp. 8–41.

(a) A brief account of the writ’s history and origins shows that protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights; in the system the Framers conceived, the writ has a centrality that must inform proper interpretation of the Suspension Clause. That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension: The writ may be suspended only when public safety requires it in times of rebellion or invasion. The Clause is designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches. It protects detainee rights by a means consistent with the Constitution’s essential design, ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance.” *Hamdi, supra*, at 536. Separation-of-powers principles, and the history that influenced their design, inform the Clause’s reach and purpose. Pp. 8–15.

(b) A diligent search of founding-era precedents and legal commentaries reveals no certain conclusions. None of the cases the parties cite reveal whether a common-law court would have granted, or refused to hear for lack of jurisdiction, a habeas petition by a prisoner deemed an enemy combatant, under a standard like the Defense Department’s in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control. The evidence as to the writ’s geographic scope at common law is informative, but, again, not dispositive. Petitioners argue that the site of their detention is analogous to two territories outside England to which the common-law writ ran, the exempt jurisdictions and India, but critical differences between these places and Guantanamo render these claims unpersuasive. The Government argues that Guantanamo is more closely analogous to Scotland and Hanover, where the writ did not run, but it is unclear whether the common-law courts lacked the power to issue the writ there, or whether they refrained from doing so for prudential reasons. The parties’ arguments that the very lack of a precedent on point supports their respective

Syllabus

positions are premised upon the doubtful assumptions that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before the Court. Pp. 15–22.

(c) The Suspension Clause has full effect at Guantanamo. The Government’s argument that the Clause affords petitioners no rights because the United States does not claim sovereignty over the naval station is rejected. Pp. 22–42.

(i) The Court does not question the Government’s position that Cuba maintains sovereignty, in the legal and technical sense, over Guantanamo, but it does not accept the Government’s premise that *de jure* sovereignty is the touchstone of habeas jurisdiction. Common-law habeas’ history provides scant support for this proposition, and it is inconsistent with the Court’s precedents and contrary to fundamental separation-of-powers principles. Pp. 22–25.

(ii) Discussions of the Constitution’s extraterritorial application in cases involving provisions other than the Suspension Clause undermine the Government’s argument. Fundamental questions regarding the Constitution’s geographic scope first arose when the Nation acquired Hawaii and the noncontiguous Territories ceded by Spain after the Spanish-American War, and Congress discontinued its prior practice of extending constitutional rights to territories by statute. In the so-called Insular Cases, the Court held that the Constitution had independent force in the territories that was not contingent upon acts of legislative grace. See, e.g., *Dorr v. United States*, 195 U. S. 138. Yet because of the difficulties and disruption inherent in transforming the former Spanish colonies’ civil-law system into an Anglo-American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See, e.g., *id.*, at 143. Practical considerations likewise influenced the Court’s analysis in *Reid v. Covert*, 354 U. S. 1, where, in applying the jury provisions of the Fifth and Sixth Amendments to American civilians being tried by the U. S. military abroad, both the plurality and the concurrences noted the relevance of practical considerations, related not to the petitioners’ citizenship, but to the place of their confinement and trial. Finally, in holding that habeas jurisdiction did not extend to enemy aliens, convicted of violating the laws of war, who were detained in a German prison during the Allied Powers’ post-World War II occupation, the Court, in *Johnson v. Eisentrager*, 339 U. S. 763, stressed the practical difficulties of ordering the production of the prisoners, *id.*, at 779. The Government’s reading of *Eisentrager* as adopting a formalistic test for determining the Suspension Clause’s reach is rejected because: (1) the

Syllabus

discussion of practical considerations in that case was integral to a part of the Court's opinion that came before it announced its holding, see *id.*, at 781; (2) it mentioned the concept of territorial sovereignty only twice in its opinion, in contrast to its significant discussion of practical barriers to the running of the writ; and (3) if the Government's reading were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid's*) functional approach. A constricted reading of *Eisen-trager* overlooks what the Court sees as a common thread uniting all these cases: The idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism. Pp. 25–34.

(iii) The Government's sovereignty-based test raises troubling separation-of-powers concerns, which are illustrated by Guantanamo's political history. Although the United States has maintained complete and uninterrupted control of Guantanamo for over 100 years, the Government's view is that the Constitution has no effect there, at least as to noncitizens, because the United States disclaimed formal sovereignty in its 1903 lease with Cuba. The Nation's basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177. These concerns have particular bearing upon the Suspension Clause question here, for the habeas writ is itself an indispensable mechanism for monitoring the separation of powers. Pp. 34–36.

(iv) Based on *Eisen-trager*, *supra*, at 777, and the Court's reasoning in its other extraterritoriality opinions, at least three factors are relevant in determining the Suspension Clause's reach: (1) the detainees' citizenship and status and the adequacy of the process through which that status was determined; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ. Application of this framework reveals, first, that petitioners' status is in dispute: They are not American citizens, but deny they are enemy combatants; and although they have been afforded some process in CSRT proceedings, there has been no *Eisen-trager*-style trial by military commission for violations of the laws of war. Second, while the sites of petitioners' apprehension and detention weigh against finding they have Suspension Clause rights, there are critical differences between *Eisen-trager's* German prison, circa 1950, and the Guantanamo Naval Station in 2008, given the Government's absolute and indefinite control over the naval station. Third, although the

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Court is sensitive to the financial and administrative costs of holding the Suspension Clause applicable in a case of military detention abroad, these factors are not dispositive because the Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas courts had jurisdiction. The situation in *Eisentrager* was far different, given the historical context and nature of the military’s mission in post-War Germany. Pp. 36–41.

(d) Petitioners are therefore entitled to the habeas privilege, and if that privilege is to be denied them, Congress must act in accordance with the Suspension Clause’s requirements. Cf. *Rasul*, 542 U. S., at 564. Pp. 41–42.

3. Because the DTA’s procedures for reviewing detainees’ status are not an adequate and effective substitute for the habeas writ, MCA §7 operates as an unconstitutional suspension of the writ. Pp. 42–64.

(a) Given its holding that the writ does not run to petitioners, the D. C. Circuit found it unnecessary to consider whether there was an adequate substitute for habeas. This Court usually remands for consideration of questions not decided below, but departure from this rule is appropriate in “exceptional” circumstances, see, e.g., *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U. S. 157, 169, here, the grave separation-of-powers issues raised by these cases and the fact that petitioners have been denied meaningful access to a judicial forum for years. Pp. 42–44.

(b) Historically, Congress has taken care to avoid suspensions of the writ. For example, the statutes at issue in the Court’s two leading cases addressing habeas substitutes, *Swain v. Pressley*, 430 U. S. 372, and *United States v. Hayman*, 342 U. S. 205, were attempts to streamline habeas relief, not to cut it back. Those cases provide little guidance here because, *inter alia*, the statutes in question gave the courts broad remedial powers to secure the historic office of the writ, and included saving clauses to preserve habeas review as an avenue of last resort. In contrast, Congress intended the DTA and the MCA to circumscribe habeas review, as is evident from the unequivocal nature of MCA §7’s jurisdiction-stripping language, from the DTA’s text limiting the Court of Appeals’ jurisdiction to assessing whether the CSRT complied with the “standards and procedures specified by the Secretary of Defense,” DTA §1005(e)(2)(C), and from the absence of a saving clause in either Act. That Congress intended to create a more limited procedure is also confirmed by the legislative history and by a comparison of the DTA and the habeas statute that would govern in MCA §7’s absence, 28 U. S. C. §2241. In §2241, Congress authorized “any justice” or “circuit judge” to issue the writ, thereby accommodat-

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ing the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court. See §2241(b). However, by granting the D. C. Circuit “exclusive” jurisdiction over petitioners’ cases, see DTA §1005(e)(2)(A), Congress has foreclosed that option in these cases. Pp. 44–49.

(c) This Court does not endeavor to offer a comprehensive summary of the requisites for an adequate habeas substitute. It is uncontroversial, however, that the habeas privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law, *INS v. St. Cyr*, 533 U. S. 289, 302, and the habeas court must have the power to order the conditional release of an individual unlawfully detained. But more may be required depending on the circumstances. Petitioners identify what they see as myriad deficiencies in the CSRTs, the most relevant being the constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant. At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government’s case, does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal’s findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore. Accordingly, for the habeas writ, or its substitute, to function as an effective and meaningful remedy in this context, the court conducting the collateral proceeding must have some ability to correct any errors, to assess the sufficiency of the Government’s evidence, and to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. *In re Yamashita*, 327 U. S. 1, 5, 8, and *Ex parte Quirin*, 317 U. S. 1, 23–25, distinguished. Pp. 49–57.

(d) Petitioners have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas. Among the constitutional infirmities from which the DTA potentially suffers are the absence of provisions allowing petitioners to challenge the President’s authority under the AUMF to detain them indefinitely, to contest the CSRT’s findings of fact, to supplement the record on review with exculpatory evidence discovered after the CSRT proceedings, and to request release. The statute cannot be read to contain each of these constitutionally required procedures. MCA §7 thus effects an unconstitutional suspension of the writ.

Syllabus

There is no jurisdictional bar to the District Court’s entertaining petitioners’ claims. Pp. 57–64.

4. Nor are there prudential barriers to habeas review. Pp. 64–70.

(a) Petitioners need not seek review of their CSRT determinations in the D. C. Circuit before proceeding with their habeas actions in the District Court. If these cases involved detainees held for only a short time while awaiting their CSRT determinations, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. But these qualifications no longer pertain here. In some instances six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. To require these detainees to pursue the limited structure of DTA review before proceeding with habeas actions would be to require additional months, if not years, of delay. This holding should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. Except in cases of undue delay, such as the present, federal courts should refrain from entertaining an enemy combatant’s habeas petition at least until after the CSRT has had a chance to review his status. Pp. 64–67.

(b) In effectuating today’s holding, certain accommodations—including channeling future cases to a single district court and requiring that court to use its discretion to accommodate to the greatest extent possible the Government’s legitimate interest in protecting sources and intelligence gathering methods—should be made to reduce the burden habeas proceedings will place on the military, without impermissibly diluting the writ’s protections. Pp. 67–68.

5. In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom’s first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. Pp. 68–70.

476 F. 3d 981, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.



THE GREAT WRIT

APPENDIX D

United States Circuit Court of Appeals, Second Circuit Decision: Bradley v.
Watkins (1947)

URL: http://www.leagle.com/decision/1947491163F2d328_1413/UNITED%20STATES%20v.%20WATKINS#

UNITED STATES v. WATKINS

**NO. 281, DOCKET 20647.
163 F.2d 328 (1947)**

UNITED STATES ex rel. BRADLEY v. WATKINS.

SWAN, Circuit Judge.

By writ of habeas corpus the relator, a native-born citizen of Norway, challenged the legality of his detention by immigration officials at Ellis Island. His petition alleged that he was illegally held as an alien enemy under an internment order issued by the Attorney General of the United States; but the respondent's return to the writ asserted that he was detained pursuant to an exclusion order, dated October 14, 1941, of a board of special inquiry, and the Assistant District Attorney stated for the record that the relator was no longer held as an alien enemy and "any order to that effect which is outstanding is withdrawn." At the hearing the following extraordinary facts appeared without dispute.

Bradley, a Norwegian and formerly a member of the Quisling party, was seized in Greenland by a landing party from a United States Coast Guard vessel before we were at war with Germany and Japan. In August 1941 he had left his native land on a Norwegian vessel bound for Greenland, where he was to be employed by the Norwegian Meteorological Institute as a meteorologist and wireless operator. He landed in Greenland on September 3d and remained ashore until he was taken into custody by the Coast Guard vessel on the night of September 14th. From that vessel he was transferred to another vessel of the United States Navy which brought him as a prisoner and against his will to the port of Boston on October 14, 1941. On that date he was taken before a board of special inquiry of the Immigration Service and given a hearing as an "applicant for admission to the United States." Although the hearing disclosed the manner of his arrival and that he never intended to come to the United States, the board held that "the applicant should be classified as a potential immigrant" and ordered his exclusion as an immigrant for lack of an unexpired immigration visa, and cognate grounds.¹ He was asked if he desired to appeal from the board's decision to the Attorney General, and replied in the negative. After being held in custody at the East Boston Immigration Station until April 1943, he was transferred to Ellis Island for internment as an alien enemy pursuant to an order of the Attorney General. See 50 U.S.C.A. § 21. Thereafter he was transferred to the detention station at Bismark, N. D., given limited parole, and employed as a track worker on the Northern Pacific Railroad. In April 1944 the Attorney General ordered that the relator's internment be continued, and he was subsequently returned to Ellis Island and is being held by the respondent for deportation to Norway, where apparently the Norwegian government wishes to put him on trial as a war criminal.²

At the hearing Bradley testified in his own behalf and the respondent put in evidence a transcript of the proceedings before the board of special inquiry in Boston, identified by the testimony of Mr. Lieberman, an attorney of the Immigration and Naturalization Service. The district judge wrote an opinion in which he found as a fact that the relator did not come to the

[163 F.2d 330]

United States voluntarily but concluded that this was immaterial, that the board of special inquiry had jurisdiction to inquire into the case and its order of exclusion was lawful, and that the relator

had failed to exhaust his administrative remedy by an appeal from the board's decision. An order was entered November 26, 1946 dismissing the writ and remanding the relator to the custody of the respondent. Thereafter, on March 10, 1947 the district court granted the relator's motion to reopen the case; and a further hearing was had which resulted in the resettled order of March 20, 1947 again dismissing the writ. This is the order before us on appeal.

The first question for consideration is whether the appellant is barred from obtaining a writ of habeas corpus because he failed to take an administrative appeal from the order of exclusion. If he was an alien to whom the immigration laws were inapplicable, he was not obliged to resort to an appeal to the Attorney General. *Gonzales v. Williams*, 192 U.S. 1, 24 S.Ct. 177, 48 L.Ed. 317. That was the case of a Porto Rican who was detained at the port of New York by the Commissioner of Immigration in 1902 as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge. It was held that since she was not an alien immigrant within the meaning of the immigration laws after Spain had ceded Porto Rico to the United States, the commissioner had no power to detain or deport her and she could obtain release on habeas corpus notwithstanding that no appeal had been taken from the administrative ruling. In *United States v. Sing Tuck*, 194 U.S. 161, 24 S.Ct. 621, 623, 48 L.Ed. 917, a Chinese, who claimed to be a United States citizen, sued out a writ of habeas corpus without having appealed to the Secretary of Commerce and Labor from the administrative order of exclusion. The writ was dismissed on the ground that the relator had not exhausted his administrative remedy; and Justice Holmes said of the *Gonzales* case, "there was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts, but merely a question of law." That is equally true here. The undisputed facts raise a question of law as to whether the relator was an alien immigrant. If that question is answered in his favor, his failure to take an appeal to the Attorney General should not be fatal to his claim.

Section 153 of Title 8 of the Code, 8 U.S.C.A. § 153, provides that "boards of special inquiry shall be appointed * * * at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants * * * under the provisions of the law." "Immigrant," as defined in 8 U.S.C.A. § 203, means "any alien departing from any place outside the United States destined for the United States," with specified exceptions. This certainly presupposes a voluntary departure and destination, although in the case of an infant or a person non compos mentis the volition may no doubt be exercised by a lawful guardian. But it is an abuse of words to say that an alien who is forcibly brought here against his will by a United States worship has "departed" from the foreign port; the reasonable connotation of that word is that the alien has taken his leave from the terminus a quo with the purpose of going to the terminus ad quem. The immigration acts, we submit, deal with aliens who are voluntarily seeking to enter the United States.³ *Moffitt v. United States*, 9 Cir., 128 F. 375, held that an alien brought to this country against his will and under a promise to take him back on the return voyage was not an immigrant within the meaning of section 10 of the Act of March 3, 1891, 26 Stat. 1086. Certainly the appellant was not "seeking to enter" the United States when brought to the port of Boston. Nor has he ever made an entry. When held at the Immigration Station at East Boston he is to be regarded as stopped
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at the boundary line, and when his prison bounds were enlarged by committing him to the custody of the Attorney General for detention and parole in North Dakota, the nature of his stay in the United States was not changed. See *Kaplan v. Tod*, 267 U.S. 228, 45 S.Ct. 257, 69 L.Ed. 585. Moreover, the section dealing with the deportation of aliens brought in in violation of law, 8 U.S.C.A. § 154, which provides that they "shall be immediately sent back, in accommodations of the same class in which they arrived," unless immediate deportation is not practicable or proper, and

that the cost of their maintenance while on land "shall be borne by the owner or owners of the vessels on which they respectively came," plainly has no application to a vessel of the United States Navy. No one, we think, would venture to suggest that boards of special inquiry have jurisdiction to pass upon the admissibility of prisoners of war brought to our shores by the armed forces of the United States. With respect to the immigration laws the status of the relator on arrival was the same, in our opinion, as that of a prisoner of war. Whether or not international law was violated by his seizure in and removal from Greenland before we became a belligerent, and whether his detention could be justified if he were still held in custody by the Navy, we need not consider, since the only justification asserted by the respondent for his detention is the exclusion order of October 14, 1941. We hold that order no justification because Bradley was not an immigrant and, consequently, the board of special inquiry had no jurisdiction to make its order of exclusion.

The respondent argues that if sufficient ground be shown for the relator's present detention, he is not to be discharged for defects in the original arrest or commitment, *Bilokumsky v. Tod*, 263 U.S. 149, 158, 44 S.Ct. 54, 68 L.Ed. 221; and that he is clearly excludable notwithstanding his involuntary arrival, since he is admittedly an alien and not in possession of an immigration visa or other document entitling him to admission to the United States. Three cases are relied upon in support of this proposition. *United States ex rel. Ling Yee Suey v. Spar*, 2 Cir., 149 F.2d 881; *Blumen v. Haff*, 9 Cir., 78 F.2d 833; *United States ex rel. Fitleberg v. McCandless*, 3 Cir., 47 F.2d 683. Each of these authorities we think distinguishable. The first involved Chinese members of the crew who were arrested by the city police and taken ashore to answer charges of rioting aboard their ship while it was in the Port of New York. Before the criminal charges were dismissed, their ship had sailed. Thereafter they were picked up by the immigration authorities for deportation. Although the warrants of arrest were defective, we held that the aliens need not be released. But in that case the Chinese crew had come to the United States of their own volition; they could be excluded and deported because they had "departed" from China "destined" for the United States, even though their physical landing in custody of the police was not an "entry." Bradley, on the contrary, had never "departed" from foreign soil "destined" for the United States. This distinction does not mean that Bradley, if released, may stay here indefinitely; obviously, as an alien, he has no right to do so. However, when it is proposed to deport him to Norway, he is entitled to demand that the authorities shall be able to point to some statute which justifies his detention and deportation. For the reasons already stated, sections 153 and 154, upon which the respondent apparently relies, are inapplicable to an alien brought here as a prisoner of the Navy.

The second authority, *Blumen v. Haff*, 9 Cir., 78 F.2d 833, deals with aliens who voluntarily came to the United States in 1924 and remained here until October 1925 when they fled to England. In August 1926 they were brought back in custody of extradition officers to be tried for larceny committed during their residence in San Francisco between April 1924 and October 1925. They pleaded guilty to the indictment and served a prison sentence ending in June 1933. They were then arrested upon warrants of deportation which stated as ground therefor that they had been convicted of a crime involving moral turpitude committed prior to their entry in August 1926. These aliens originally entered the United States voluntarily and the case was considered as involving deportation, not exclusion proceedings. It has no resemblance to the [163 F.2d 332]

case at bar except for the fact that in August 1926 the aliens were brought back against their will by extradition. In so far as that was held to be an "entry," we respectfully disagree. Cf. *United States ex rel. Ling Yee Suey v. Spar*, 2 Cir., 149 F.2d 881, 883; *United States ex rel. Consola v. Karnuth*, D.C., W.D.N.Y., 25 F.Supp. 902.

The third authority, *United States ex rel. Fitleberg v. McCandless*, 3 Cir., 47 F.2d 683, 684, is equally remote. There the alien, prior to his arrest and extradition to Canada, had several times unlawfully entered the United States. Upon acquittal of the criminal charge, the Canadian authorities delivered him to immigration officers of the United States, who held him for deportation to England. He contended that since he was brought back to the United States forcibly and against his will he was not "found in the United States in violation of the United States immigration laws." In overruling this contention the court noted that the appellant was voluntarily and unlawfully here when arrested for extradition to Canada and remarked that "By returning him to this country, the Canadian officials put him back into the same status he occupied prior to his extradition."

No authority has been called to our attention, nor has independent investigation disclosed any, which deals with facts similar to those at bar. The theory that an alien can be seized on foreign soil by armed forces of the United States Navy, brought as a prisoner to our shores, turned over to the immigration authorities as being an "applicant for admission to the United States," held in custody by them for nearly six years, and then deported to the country of his nativity by virtue of the exclusion order savors of those very ideologies against which our nation has just fought the greatest war of history. The relator is entitled to be released from custody although he has no right to enter the United States. He is an experienced seaman and states through his counsel that he has no desire to enter the United States but wishes to ship out as a seaman on a foreign bound vessel. He has this privilege and it will rid the United States of an alien who has no right to remain here. We do not decide what action is open to remove him if he shall fail to make good this proposal. We do not wish to be understood as suggesting that there is no means forcibly to remove him, but only that the proceeding here taken is without jurisdiction.

The order is reversed and the cause remanded with directions to sustain the writ and discharge the relator.

AUGUSTUS N. HAND, Circuit Judge (dissenting).

I think the analysis of 8 U.S.C.A. § 203 in the prevailing opinion gives no assurance that upon the discharge of Bradley by the immigration authorities there will be any way of deporting him. It is most unlikely that a man arrested and brought to this country on a man-of-war of the United States can be ordered sent back on the vessel he came on like an immigrant unlawfully brought to our shores by a passenger vessel. Certainly statutory authority is lacking to fine the United States for thus bringing him here, or to order the United States Navy to carry him back. It is harder for me to believe that an alien — who concededly has no right to stay here — cannot be removed, than to believe that he can be removed under the immigration statute because he is within the definition of 8 U.S. C.A. § 203 which describes an immigrant as "any alien departing from any place outside the United States destined for the United States."

Bradley literally "departed" from Greenland when he was transported from that country; likewise he was "destined for the United States" when he left Greenland for America.

The majority opinion treats the definition of "immigrant" given in 8 U.S.C.A. § 203 as presupposing a voluntary departure of an alien from foreign country with the intention of entering the United States as his terminus ad quem, and cites as authority the decision of the Ninth Circuit in *Moffitt v. United States*, 128 F. 375 381, which construed the term "alien immigrant," used in the Act of March 3, 1891, c. 551, 26 Stat. 1084, as referring only to aliens who leave a foreign shore "to

come to the United States for the purpose of becoming a permanent resident here." But that decision

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was made in the absence of any congressional definition of the term "immigrant" and was based on a standard dictionary meaning of the word which it was presumed Congress intended to apply. It is, however, now clear that Congress has since displaced that judicial interpretation of the word "immigrant" by its own definition, which is much broader in language and limited only by specific exceptions set forth. The statutory definition first appeared in the Act of May 26, 1924, c. 190, § 3, 43 Stat. 154, and has been retained unchanged in subsequent reenactments. 8 U.S.C.A. § 203. Because of the breadth of the statutory definition, Congress has deemed it necessary specifically to except such persons as bona fide alien seamen serving as such on vessels visiting our seaports. It would have been completely unnecessary to make any such exception to its definition of "immigrant" if that basic definition were no broader than the one used by the court in *Moffitt v. United States*, 9 Cir., 128 F. 375, and other early decisions there cited. See e. g., *United States v. Sandrey*, C.C., E.D.La., 1891, 48 F. 550, 552, 553.

It is now asserted that in *United States ex rel. Ling Yee Suey v. Spar*, 2 Cir., 149 F.2d 881, the Chinese crew members had come to the United States of their own volition and hence might be said to have "departed" from China "destined" for the United States, even though their physical landing in custody of the police was not an "entry." But those Chinese sailors were aboard a British vessel which had arrived at the Port of New York from Singapore and was apparently scheduled to return, with its Chinese crew members, to the latter port. It is difficult for me to see how the United States there — any more than in the present case — was the terminus ad quem which the aliens had set for themselves for the purpose of becoming permanent residents here, even though at the outset of their voyage from Singapore they may have known that the vessel was due to put in at New York as a port of call during its voyage. In other words, our decision in *United States ex rel. Ling Yee Suey v. Spar*, supra, filed in June, 1945, necessarily assumed that the statutory definition of "immigrant" first enacted in 1924 superseded the pre-1924 judicial interpretation of the term made in such decisions as *Moffitt v. United States*, which the majority opinion here cites with approval. Accordingly, there was no less of a departure, "destined for the United States," in the case at bar than in that of *Ling Yee Suey*, and the petitioner here is no more entitled to enter the United States without a quota immigration visa than were the petitioners in that case.

In *United States ex rel. Von Kleczkowski v. Watkins*, D.C., 71 F.Supp. 429, April 22, 1947, Judge Rifkind was faced with the contention that two enemy aliens brought into the United States involuntarily by the government were not subject to the immigration law and thought the point so clearly settled against them by the present immigration statute that he disposed of it by citing *United States ex rel. Ling Yee Suey v. Spar*, 2 Cir., 149 F.2d 881, and nothing more.

It seems to me that the engrafting of a new implied exception into the immigration statutes is likely to give rise to serious future troubles in the interpretation of a mass of statutes that are already difficult and confusing. It may be argued that the situation here presented is unusual and unlikely to recur, but I cannot foresee how many aliens of the sort we have to deal with here may be at large in this country and have more concern lest the decision of the majority should leave the executive without any power either to intern or deport such persons than I have that the latter may be subjected to a somewhat new application of a statute that is broad enough in its terms to include them. I think the order dismissing the writ of habeas corpus should be affirmed.



THE GREAT WRIT

APPENDIX E

Ex. Parte Merryman (1861)

URL: <http://teachingamericanhistory.org/library/document/ex-parte-merryman/>

Arrest of John Merryman and Proceedings Thereon

1861, May 25 — John Merryman, of Baltimore county, Md., was arrested, charged with holding a commission—as lieutenant in a company avowing its purpose of armed hostility against the Government; with being in communication with the rebels, and with various acts of treason. He was lodged in Fort McHenry, in command of Gen. Geo. Cadwalader. Merryman at once forwarded a petition to Chief Justice Roger B. Taney, reciting his arrest, and praying for a writ of habeas corpus and a hearing. The writ was issued for the 27th, to which General Cadwalader declined to respond, alleging, among other things, that he was duly authorized by the President of the United States to suspend the writ of habeas corpus for the public safety. May 27, the Chief Justice issued a writ of attachment, directing United States Marshal Bonifant to produce the body of General Cadwalader on Tuesday, May 28th, “to answer for his contempt in refusing to produce the body of John Merryman.” May 28th, the Marshal replied that he proceeded to the fort to serve the writ, that he was not permitted to enter the gate, and that he was informed “there was not answer to his writ.”

Ex parte John Merryman.

Before the Chief Justice of the Supreme Court of the United States, at Chambers.

The application in this case for a writ of habeas corpus is made to me under the 14th section of the Judiciary Act of 1789, which renders effectual for the citizen the constitutional privilege of the habeas corpus. That act gives to the Courts of the United States, as well as to each Justice of the Supreme Court, and to every District Judge, power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. The petition was presented to me at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, at the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw Gen. Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county. While peaceably in his own house, with his family, it was at two o'clock, on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, Gen. George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of Gen. Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry by his order, and placed in his (Gen. Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant, or order, under which the prisoner was arrested, was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting an offense against the laws of the United States, has been charged against him upon oath; but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts, which, in the judgment of the military officer, constituted these crimes. And having the prisoner thus in custody upon these vague and

unsupported accusations, he refuses to obey the writ of habeas corpus, upon the ground that he is duly authorized by the President to suspend it.

The case, then, is simply this: A military officer residing in Pennsylvania issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night; he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of habeas corpus at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there is no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress.

When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and believing as I do that the President has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of this act without a careful and deliberate examination of the whole subject.

The clause in the Constitution which authorizes the suspension of the privilege of the writ of habeas corpus is in the ninth section of the first article.

This article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and

House of Representatives.” And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants, and legislative powers which it expressly prohibits, and, at the conclusion of this specification, a clause is inserted giving Congress “the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof.”

The power of legislation granted by this latter clause is by its word carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen and to the rights and equality of the States by denying to Congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt, where rights of such vital importance were concerned, and, accordingly this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the Constitution attached to the privilege of the writ of habeas corpus, to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers; and even in these cases the power is denied and its exercise prohibited unless the public safety shall require it. It is true that in the cases mentioned Congress is of necessity the judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it and of the extreme caution they should exercise before they give the Government of the United States such power over the liberty of a citizen.

It is the second article of the Constitution that provides for the organization of the Executive Department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizens now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the Executive power shall be vested in a President of the United States of America, to hold his office during the term of four years, and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him and the duties imposed upon him. And the short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehensions of future danger which the framers of the Constitution felt in relation to that department of the Government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English Government which were considered as dangerous to the liberty of the subject, and conferred (as that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the Government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office. He is, from necessity, and the nature of his duties, the Commander-in-Chief of the army and navy, and of the militia, when called into actual service. But no appropriation for the support of the army can be made by Congress for a longer term than two years, so that it is in the power of the succeeding House of Representatives to

withhold the appropriation for its support, and thus disband it, if, in their judgment, the President used or designed to use it for improper purposes. And although the militia, when in actual service, are under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of Government, nor make a treaty with a foreign nation or Indian tribe without the advice and consent of the Senate, and cannot appoint even inferior officers unless he is authorized by an act of Congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person “shall be deprived of life, liberty, or property without due process of law;” that is, judicial process. And even if the privilege of the writ of habeas corpus was suspended by act of Congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the Amendments to the Constitution immediately following the one above referred to—that is, the sixth article—provides that, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

And the only power, therefore, which the President possesses, where the “life, liberty, or property” of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires “that he shall take care that the laws be faithfully executed.” He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution as they are expounded and adjudged by the coordinate branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of habeas corpus—and the judicial power, also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessities of government for self-defense, in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches—executive, legislative or judicial—can exercise any of the powers of government beyond those specified and granted. For the tenth article of the amendments to the Constitution, in express terms, provides that “the powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.”

Indeed, the security against imprisonment by Executive authority, provided for in the fifth article of the Amendments of the Constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the Declaration of Independence.

Blackstone, in his Commentaries, (1st vol., 137,) states it in the following words:

“To make imprisonment lawful, it must be either by process from the courts of judicature or by warrant from some legal officer having authority to commit to prison.”

And the people of the United Colonies, who had themselves lived under its protection while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing the Government intended to guard still more efficiently the rights and the liberties of the citizens against executive encroachment and oppression, they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the Crown, and which the people of England had compelled it to surrender after a long and obstinate struggle on the part of the English Executive to usurp and retain it.

The right of the subject to the benefit of the writ of habeas corpus, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the Revolution. For, from the earliest history of the common law, if a person was imprisoned—no matter by what authority—he had a right to the writ of habeas corpus, to bring his case before the King’s Bench, and, if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character the court was bound to set him at liberty on bail. And the most exciting contests between the Crown and the people of England from the time of Magna Charta were in relation to the privilege of this writ, and they continued until the passage of the statute of 31st Charles 2d, commonly known as the great habeas corpus act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the Government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute of 13 William III., the Judges held their offices at the pleasure of the King, and the influence which he exercised over timid, time-serving and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the King for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the habeas corpus act of the 31st Charles II is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law upon this subject, and the abuses which were practiced through the power and influence of the Crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone, in his Commentaries on the laws of England (3d vol., 133, 134,) says:

"To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible.

"But the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court upon a habeas corpus may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

"And yet early in the reign of Charles I the Court of King's Bench, relying on some arbitrary precedents, (and those perhaps misunderstood) determined that they would not, upon a habeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the King or by the Lords of the Privy Council. This drew on a Parliamentary inquiry, and produced the Petition of Right –3 Chas. I–which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the Lords of the Council in pursuance of his Majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the King and the Government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment; the Chief Justice, Sir Nicholas Hyde, at the same time declaring that 'if they were again remanded for that cause perhaps the court would not afterward grant a habeas corpus being already acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years."

It is worthy of remark, that the offenses charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Seldon. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty upon the habeas corpus issued in his behalf excited the universal indignation of the bar. The extract from Hallam's Constitutional History is equally impressive and equally in point. It is in vol. 4, p. 14:

"It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English

law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the Court of King's Bench a writ of habeas corpus ad subjiciendum directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta, (if indeed it was not more ancient,) that the statute of Charles II was enacted, but to cut off the abuses by which the Government's lust of power and servile subtlety of Crown lawyers had impaired so fundamental a privilege."

While the value set upon this writ in England has been so great that the removal of the abuses which embarrassed its employment have been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of Parliament, can suspend or authorize the suspension of the writ of habeas corpus. I quote again from Blackstone (1 Comm., 136:) "But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only or legislative power that, whenever it sees proper, can authorize the Crown, by suspending the habeas corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing." And if the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown—a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question from analogies between the English Government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States, and also the clear and authoritative decision of that Court itself, given more than half a century since, and conclusively establishing the principles I have above stated. Mr. Justice Story, speaking in his Commentaries, of the habeas corpus clause in the Constitution, says:

(3 Story, Comm. Const. section 1336):

It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the

power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.” –3 Story’s Com. on the Constitution, section 1,336.

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case *ex parte Bollman and Swartwout*, uses this decisive language, in 4 Cranch, 95:

“It may be worthy of remark, that this act, (speaking of the one under which I am proceeding,) was passed by the First Congress of the United States, sitting under a Constitution which had declared ‘that the privilege of the writ of habeas corpus should not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.’ Acting under the immediate influence of this injunction, they must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation they give to all the courts the power of awarding writs of habeas corpus.

And again, in page 101:

“If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.”

I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For at the time these proceedings were had against John Merryman, the District Judge of Maryland—the commissioner appointed under the act of Congress—the District Attorney and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any Court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it to the District Attorney, and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshal to arrest him, and, upon the hearing of the party, would have held him to bail, or committed him for trial, according to the character of the offense as it appeared in the testimony, or would have discharged him immediately if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the District of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any) is sufficient to support the

accusation and justify the commitment; and commits the party, without having a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that “no person shall be deprived of life, liberty, or property, without due process of law.” It declares that “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me; and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a Government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to “take care that the laws be faithfully executed,” to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

R. B. Taney,

Chief Justice of the Supreme Court of the United States

APPENDIX F

Constitution Check: Is the president's power to detain terrorism suspects about to lapse? by Lyle Denniston

URL: <http://blog.constitutioncenter.org/2014/09/constitution-check-is-the-presidents-powers-to-detain-terrorism-suspects-about-to-lapse/>

Constitution Check: Is the president's power to detain terrorism suspects about to lapse?

Lyle Denniston from Constitution Daily

Lyle Denniston, the National Constitution Center's adviser on constitutional literacy, looks at how the federal courts could be drawn into a controversy over the president's powers to detain terror suspects once U.S. combat soldiers leave Afghanistan.

THE STATEMENT AT ISSUE:

"The government is bracing for a wave of new habeas corpus lawsuits after combat operations in Afghanistan come to an end in December, raising the question of whether the legal basis for wartime detentions – the 2001 authorization to use military force against the perpetrators of the Sept. 11 attacks – has expired. J. Alan Liotta, the top Pentagon detainee affairs official, said that he expects the detention authority to remain viable because most detainees are considered part of Al Qaeda or an associated force, rather than solely Taliban, and the broader armed conflict continues."

WE CHECKED THE CONSTITUTION, AND...

America has been involved in many wars, some conducted in ways that fully complied with limits set by the Constitution, and some that were not. But the Constitution has never been understood to allow for an unending war, one that has no definite end-point. As the U.S. military combat effort in Afghanistan approaches its planned conclusion at the close of this year, federal courts are certain to be drawn into a new controversy over what that will mean, constitutionally.

In fact, that new controversy has already begun, in anticipation of the withdrawal of the last U.S. combat soldiers from Afghanistan – if President Obama's timetable is fulfilled. Last month, a federal judge in Washington, D.C., refused to decide a claim by a Kuwaiti national held at Guantanamo for more than 12 years that his detention will become illegal with the end of hostilities in that Asian country. The judge said that it is unknown at this time what the situation will be when that happens, so she did not have a live controversy at stake, and thus had no jurisdiction to decide.

However, the judge specified that she would allow the detainee to renew his challenge at a later time, depending upon whether the government still insists on holding him after all of the troops have come home. President Obama has made some public statements that have suggested that, once hostilities are over, detainees will be released. But Pentagon officials have made public statements suggesting that they will not easily relinquish custody of all detainees, even if there is no combat operation going on in Afghanistan.

Ever since the terrorist attacks on the U.S. on September 11, 2001, the power of the president and his subordinates to detain terrorism suspects has been based upon the Authorization for Use of Military Force, passed swiftly by Congress right after those attacks. As written, it seemed aimed only at those who were directly involved in or helped out with those specific attacks.

President George W. Bush and, later, President Obama have insisted that the power to detain goes beyond the actual perpetrators of the 2001 assault, and some government lawyers have actually argued in court that the AUMF provides detention power throughout the globe, because the terrorist threat reaches worldwide.

When the Supreme Court 10 years ago first upheld the AUMF resolution as the basis for detention of terrorism suspects, it noted specifically that this was limited to the duration of armed conflict. Last April, when the court turned down one Guantanamo detainee's appeal of his imprisonment, one of the members of the court – Justice Stephen G. Breyer – noted in a separate opinion that the court had never ruled on whether “either the AUMF or the Constitution limits the duration of detention.” That is exactly the question that will reach the courts post-Afghanistan.

In the decision last month by a federal judge in Washington concluding that it was too soon for the courts to answer that question, a number of passages in her opinion at least hinted at the idea that, once the Afghanistan combat operations cease, detention would, in fact, become unlawful. But since she was not formally ruling on the issue, those comments do not have the force of law.

The new terrorism tensions in the world, especially with the rise of the militant Islamic State movement in Iraq and Syria, U.S. officials are beginning to work out strategies on how to respond to the new challenges. It would be no surprise if one of the options that the government could pursue would be to ask Congress for a new grant of power to carry on anti-terrorism operations – including a fresh authority to detain terrorism suspects.

If the White House and Congress could agree on such a new authorization, the chances would appear to be fairly high that the courts would react by concluding that this joint effort by the two political branches to combat new terrorist threats would be sufficient, constitutionally. After all, the courts have been quite willing to give expansive interpretations to the AUMF passed in 2001.

But if there were to be no new resolution of that kind, then it would appear that the courts would have to confront whether the president, after Afghanistan, could assert new detention power based only on his own executive branch authority under Article II – especially, the unspecified but sweeping range of powers that go with the Commander in Chief role.

It is possible, already, to hear public statements by Pentagon officials that they are persuaded, at least for the time being, that the AUMF from 2001 is broad enough to maintain detention power in existence even post-Afghanistan.

So far, it is not fully clear just what legal and constitutional arguments would be made in court by government lawyers should they seek to follow through on those comments from the Pentagon. Most of the key documents filed in the Washington case decided last month remain out of public view, but those may well have contained at least hints of what the government is thinking, legally and constitutionally, in anticipation of the end of combat in Asia.



THE GREAT WRIT

APPENDIX G

Worksheet: Decoding a Court Opinion Protocol



THE GREAT WRIT

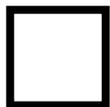
HABEAS CORPUS-
DECODING SUPREME COURT OPINIONS



BOUMEDIENE V. BUSH (2008)



BRADLEY V. WATKINS (1947)



EX. PARTE MERRYMAN (1861)

KEY TERMS TO KNOW

FACTS OF THE CASE Who is involved? What is happening?

CONSTITUTIONAL QUESTION What issue has the Court been asked to decide upon?

CONSTITUTIONAL CONNECTION What part of the Constitution does the issue connect to?

BUZZWORDS

UNKNOWN TERMS

DECISION What was the Court's answer to the Constitutional Question?

