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# Habeas Corpus in the age of Guantánamo

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# HABEAS CORPUS IN THE AGE OF GUANTÁNAMO

*The purpose of the article is to examine the meaning of habeas corpus in the age of the war on terror and the detention camps at Guantanamo Bay. Since the war on terror was declared in 2001, the writ has been invoked from quarters not normally considered within the federal courts' domain. In this article, I set out to do two things: first, I provide an overview of the writ's history in the United States, and explain its connection to federalism and unlawful executive detention. I then set out to bridge the two meanings of habeas corpus. Second, then, I examine the cases that came out of Guantanamo Bay, and explain their connection to the writ's true meaning. In conclusion, I find that there is no discrepancy between habeas as a tool of liberty for the guilty and for the detained.*

Key words: *Guantanamo Camps. – Habeas Corpus. – Terrorism. – Unlawful Detention.*

## 1. WRIT'S HISTORY IN THE UNITED STATES

The writ of habeas corpus "provides a mode for the redress of denials of due process of law."[1] In more prosaic terms, under United States federal law, the writ allows state prisoners, following conviction, to appeal to a federal district court and contest the reasons for the judgment.[2] The law on habeas corpus commands courts to act "within their respective jurisdictions," but is also "directed to the person having custody of the person detained."[3] In other words, a federal habeas court must have

[1] *Fay v. Noia*, 372 U.S. 391, 402 (1963).

[2] The Habeas Corpus Act of Feb 5, 1867, ch. 28 14 Stat. 385.

[3] 28 U.S.C. secs. 2241(a), 2243 (2000).

jurisdiction over a case to hear it and decide on the merits. But if a federal court finds for the defendant, the power of the federal court is supreme: the case is either sent back to the state court in accordance with the court's ruling, or the prisoner is set free.

Under English common law practice that held constant in the U.S. until the middle of the nineteenth century, habeas corpus was used by those held in jail prior to conviction.[4] After the Civil War, however, the writ has been almost exclusively a post-conviction remedy. A person, duly convicted by a state court, can petition a federal court on a writ of habeas corpus for relief. And here lies the problem. As the United States has a dual system of criminal justice, state and federal, the writ's power to reach into a state court's decision is a cause for concern among state judges because a granted federal writ means that the state court erred on an important constitutional matter. A convicted murderer could go free. Rather than extending power over state court decisions, federal courts have largely refrained from issuing habeas corpus to prisoners who have not exhausted all possible state remedies before applying for the writ in a federal court. "It would be unseemly our in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."[5]

Because of the inherent tension between the states and the federal government regarding the administration of criminal justice, the Supreme Court has also preferred to emphasize deference to state court decisions in habeas corpus cases, while preserving in principle the federal government's power to set criminals free, as the circumstances demand. Although concerns over federalism and, more broadly, criminal justice policy, have long constrained the writ's reach in the U.S., as the conception of due process widened in the twentieth century to include the rights of the accused at every stage of the administration of criminal justice, the Supreme Court increasingly came to see the limitations on the writ of habeas corpus as less important than the application of justice to one who was unlawfully confined. As Justice Felix Frankfurter wrote in *Brown* v. *Allen* (1953), "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[6]

The purpose of the article is to examine the writ's meaning in the age of the war on terror and during a time when prisoners of war are held, without trial, at Guantanamo Bay, Cuba. Since President George W. Bush

[4] See *Harris* v. *Nelson*, 394 U.S. 286 (1969); *Ex parte Royall*, 117 U.S. 241 (1886); W. Duker, *A Constitutional History of Habeas Corpus*, Greenwood Press, Westport 1980.

[5] *Darr* v. *Burford*, 339 U.S. 200, 204 (1950).

[6] *Brown* v. *Allen*, 344 U.S. 443 (1953).

declared a "war on terror," following the attack against the United States on September 11, 2001, the writ has been invoked from quarters not normally considered within the federal courts' domain. Habeas corpus in the United States is largely a tool of the criminal justice system, and involved in questions of federal-state criminal justice. Since 9/11, however, the writ has been called into use from those being detained in Guantanamo Bay, Cuba, claiming unlawful executive detention. Can these two forms of habeas corpus be reconciled?

In this article, I set out to do two things: first, I provide an overview of the writ's history in the United States, and explain its connection to federalism. I also highlight the writ's connection to executive power.[7] At the writ's core is a check on unlawful executive detention. But this is not how it is presented. It is, rather, seen by critics as a get out of jail card for convicted felons.[8] How, then to make the connection between a tool of criminal justice and a method of release from Guantanamo Bay, Cuba? Second, I examine the cases that came out of Guantanamo Bay, and explain their connection to the writ's true meaning. In conclusion, I find that there is no discrepancy between habeas as a tool of liberty for the guilty and for the detained.

The Constitution imposes certain limitations on federal power that countries with more unified systems of government do not have. In particular, the first ten amendments to the United States Constitution did not, from their inception, apply to the states.[9] This meant that the prohibitions mentioned (protection of counsel; the necessity of warrants, and the like) could only be enforced against the federal government. The states were free, within the boundaries of their own constitutions, to set the limits on the administration of justice. Indeed, even after passage of the Fourteenth Amendment, in 1868, which states that "No state shall deny to any person life, liberty, and property without due process of law," the federal government's reach into the states' administration of criminal justice remained circumscribed by policy matters. In the post-war environment of comity between levels of government, the Supreme Court coupled a regard for the states' abilities to govern crime in a manner complicit with a regard for individual liberties and good sense with an ideological understanding of the limitations on the federal government's powers in areas that it had not been given explicit grants of power under the Constitution, and maintained that the meaning of due process was different from the content of

[7] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 218–219 (1953) (dissenting opinion); G. Neumann, "Anomalous Zones," *Stanford Law Review* 48/1996, 1197–1234.

[8] R. Posner, *Rethinking the Fourth Amendment*, 1981 Supreme Court Review 49 (1982).

[9] *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

the protections outlined in the Bill of Rights.[10] In the words of Justice Stanley Reed, "the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states."[11]

It is clear that both the framers of the Constitution and the justices of the Supreme Court (both past and present) feared the writ's effects on the states' criminal procedures. Consequently, they chose to filter habeas corpus through the federal structure of the new American state. Notably, the Judiciary Act of 1789[12] prohibited state prisoners from petitioning federal courts for habeas corpus.[13] However, following a series of antebellum sectional crises in which various states arrested (or threatened to arrest) federal revenue officers (in 1815 and 1833), a foreign national (1842), and military personnel (1863), Congress extended federal habeas corpus to the state level.[14] Although explicitly temporary in nature, and designed to protect federal officers not state convicts, these various removal and habeas corpus statutes created "a pathway to the states,"[15] that eased passage of the Habeas Corpus Act of 1867.

The 1867 Habeas Corpus Act states, in part, that:

> the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law [the 1789 act], 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.[16]

The 1867 Act stands as an example of post-Civil War statemaking. With a statutory command to the federal courts to "have the body" of any prisoner seeking relief, Congress ignored state sovereignty concerns regarding finality of punishment and codified the budding relationship prisoners would have with the national judiciary under the fourteenth amendment.

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[10] *Palko* v. *Connecticut*, 302 U.S. 319 (1937).

[11] *Adamson* v. *California*, 332 U.S. 46, 51 (1947).

[12] Judiciary Act of 1789, Ch. 20, 1 Stat. 73–93 (1789).

[13] *INS* v. *St. Cyr*, 533 U.S. 289 (2001).

[14] The acts in question: Act of Feb. 4, 1815 (removal), c. 31, 3 Stat. 105; Act of March 3, 1815 (same), c. 94, 3 Stat. 231; Act of March 3, 1817 (same), c. 109, 3 Stat. 396; Act of March 2, 1833 (removal and habeas corpus), c. 57, 4 Stat. 632; Act of Aug. 23, 1842 (habeas corpus), c. 188, 5 Stat. 516; Act of March 3, 1863 (habeas corpus), c. 81, 12 Stat. 755; Act of March 7, 1864 (same), c. 20, 13 Stat. 14; Act of Jan. 13, 1866 (both), c. 184 Stat. 98; Act of May 11, 1866 (both), c. 80, 14 Stat. 46; Act of Feb. 5, 1867 (habeas corpus), c. 27, 14 Stat. 385. The debates in 1863 specifically refer to the 1815 removal statute. *Congressional Globe*, 37th Congress, 3d session (Jan. 27, 1863), p. 534.

[15] P. Lucie, *Freedom and Federalism: Congress and Courts, 1861–1866,* Garland Press, New York 1986, 156.

[16] The Habeas Corpus Act of Feb 5, 1867, ch. 28 14 Stat. 385. Italics added.

Despite Congress' boldness in the face of a history of state control over punishment, the wording of the 1867 Habeas Act does not establish a bright-line relationship between the incarcerated and the federal courts that bypasses the state court system.[17] The Supreme Court in the post-Reconstruction era (i.e., after 1877) ignored the nationalist intent of the legislation and focused on the writ's common law legacy in the US.[18] The problem with the 1867 Habeas Act is that, if used as a postconviction remedy, the determination of equitable relief falls not to Congress or to the states but to Supreme Court justices and federal court judges, who presumably are free to investigate the prisoner's complaints and set him free. Crime is no longer a local matter, but a constitutional question, despite the legal fiction that habeas relief does not overturn state court decisions; it releases individuals from unlawful confinement. But the idea persists that the decision to release a prisoner on habeas corpus upsets the federal-state balance cultivated over time by congressional leaders and Supreme Court justices.[19]

Rather than accept the burden of acting like a clemency commission or a supervisor of state court criminal justice decisions, the Supreme Court, in its first important habeas corpus decision after Reconstruction ended, held in *Ex parte Royall* (1886) that any constitutional infraction of a defendant's rights (such as they were in the nineteenth century) could be dealt with by state courts, in an effort to nurture federal-state comity relations in the post-war period.[20] Apart from the stated belief that it was best not to meddle in the states' affairs, a policy of deference on criminal matters would provide the federal courts with sufficient time to deal with property claims arising from the Supreme Court's decisions equating property with persons.[21] In short, in *Royall*, the Court considered federal review of state prisoners' claims wasteful of important (and limited) judicial resources, as well as constitutionally unnecessary, given the dual nature of the judicial system and the historic reliance on state courts to dispense justice to criminals. The post-Reconstruction Supreme Court considered state habeas petitioners convicted criminals, and therefore were reluctant to release prisoners found guilty of crimes, ranging from forgery to murder.[22]

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[17] *Wade* v. *Mayo*, 334 U.S. 672 (1948).

[18] D. Oaks, "Habeas Corpus in the States – 1776–1865," *University of Chicago Law Review* 32(2)/1965, 243–288; M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," *Tulane Law Review* 70/1995, 1–73.

[19] *Darr* v. *Burford*, 339 U.S. 200 (1950); P. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," *Harvard Law Review* 76/1963, 441–528.

[20] *Royall* at 248–249.

[21] *County of Santa Clara* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886).

[22] *In re Wood*, 140 U.S. 278 (1890); *In re Shibuya Jugiro*, 140 U.S. 291 (1891); *In re Frederich*, 149 U.S. 70 (1893); *Andrews* v. *Swarts*, 156 U.S. 272 (1894).

> [A] habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or a sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment of sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's exceeding its jurisdiction.[23]

From the end of Reconstruction to the middle of the twentieth century, purposeful congressional forbearance from civil rights violations at the state level, and pressing property cases at the national, allowed the Supreme Court to give a narrow and procedural meaning to the Due Process Clause of the Fourteenth Amendment in criminal matters as well as to habeas corpus.[24] The Supreme Court's extension of property rights under the Fourteenth Amendment shaped habeas's development in the nineteenth and early twentieth centuries by squeezing out civil rights claims in the federal judiciary.[25] The Court's propertarian understanding of due process rights created an underlying pattern of chaos within American civil rights development.[26] Throughout the nineteenth century, and well into the twentieth, claims of constitutionally questionable arrests, confessions, and trials went unheeded in the state appellate courts while the federal judiciary's defense of property regularized the American state.[27]

Slowly, however, the idea of selectively incorporating the Bill of Rights showed signs of strain.[28] In *Palko* v. *Connecticut*, Justice Benjamin Cardozo held that, in a case involving double jeopardy, the Fourteenth Amendment's Due Process Clause protected only those rights that were "of the very essence of a scheme of ordered liberty."[29] The Court refused to incorporate the Fifth Amendment's Due Process Clause into the Fourteenth Amendment. But it opened the door to reconsidering the restrictions on incorporating the Bill of Rights, perhaps with a different calculus than sheer imposition of will.[30] Indeed, as it became more than apparent by the 1930s and 1940s that the states could not contain the

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[23] *In re Friedrich* at 76.

[24] *Hurtado* v. *California*, 110 U.S. 516 (1884); *In re Kemmler*, 136 U.S. 436 (1890); *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

[25] *Hale* v. *Henkel*, 201 U.S. 43 (1906).

[26] *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897).

[27] *Wabash, St. Louis and Pacific Railway Co. v. Illinois, 188 U.S. 557 (1886); Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940)*; J. Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy,* University of Chicago Press Chicago, 1994, 8.

[28] *C. Fairman,* "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2/1949, 5–139.

[29] *Palko* at 325.

[30] *Adamson* v. *California* at 70–71 (J. Black, dissenting).

worst impulses of majority enmity toward minorities,[31] and the content and meaning of ordered liberty underwent a rethinking.

The Court incorporated the First Amendment's speech and association clauses early in the twentieth century.[32] During the 1960s, the Supreme Court, under Chief Justice Earl Warren, embarked on a program to expand due process for criminal defendants. In short order, the Court expanded the rights of the accused regarding warrant requirements for searches,[33] protections against cruel and unusual punishment,[34] the right to counsel,[35] and the right to remain silent.[36] "By reinterpreting the major provisions of the Bill of Rights to comply with the due process demands of 'fundamental fairness,' the Court's criminal justice cases created a constitutional revolution in due process."[37] But this revolution, precisely because it was a radical break with the constitutional past, came at a cost.

By the end of the decade, Justice Hugo Black, writing in dissent in *Kaufman* v. *U.S.*, expressed his concern that "not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus."[38] That is, the fact that habeas corpus, as a postconviction remedy for unlawful confinement, could, in principle, set a convicted criminal free on something less than a substantive claim of innocence (a faulty jury pool, or a less-than-stellar defense by counsel), caused the federal judiciary to rethink the effects of a liberal habeas corpus policy that interfered with the administration of criminal justice at the state level. In the decades that followed, the Supreme Court, under Chief Justices Warren Burger and William Rehnquist, returned to the themes of the nineteenth century that the Warren Court had abandoned: deference to state court convictions, barring substantive claims of procedural violations. In the name of federalism, or what the Court called "federal-state comity," the Supreme Court largely rescinded the Warren Court's expansive reading of habeas corpus.[39]

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[31] *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152 (1944).

[32] *Gitlow* v. *New York*, 268 US 652 (1925); *Near* v. *Minnesota*, 283 US 697 (1931); *Cantwell* v. *Connecticut*, 310 US 296 (1940).

[33] *Mapp* v. *Ohio*, 367 US. 643 (1961).

[34] *Robinson* v. *California*, 370 U.S. 660 (1962).

[35] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[36] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Griffin* v. *California*, 380 U.S. 609 (1965).

[37] C. Federman, *The Body and the State: Habeas Corpus and American Jurisprudence*, State University of New York, Albany 2006, 100; *Brown* v. *Mississippi* at 285.

[38] *Kaufman* v. *United States*, 394 U.S. 217 (1969).

[39] *Stone* v. *Powell*, 428 U.S. 465 (1976); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Rose* v. *Lundy*, 455 U.S. 509 (1982); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Teague* v. *Lane*,

The meaning and extent of the writ of habeas corpus belongs to the judiciary. But the federal judiciary is unelected, and as such, poses certain problems for democratic theory. Habeas corpus allows life-tenured judges to overturn the decision of twelve jurors, who, presumably, understand crime from a far different perspective than a life-tenured judge. Congress, the most democratic of the branches of government, has largely refrained from interfering with habeas corpus, but in the late 1940s it did so, amid criticisms from state judges that the increasing application of habeas corpus to cases contesting confinement interfered with the states' administration of criminal justice.[40] In 1948, Congress passed an act to enforce a Supreme Court-created rule that forced all state prisoners seeking habeas relief first to exhaust all possible state remedies, before pursuing federal habeas corpus.[41] After the 1948 reforms, there were further attempts to restrict the writ's reach, but all failed to pass either one house of Congress or both. In 1996, however, one year after the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, was destroyed by a car bomb in a terrorist attack, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA).[42] Titles II through VIII address various aspects of domestic and international terrorism. Title I is concerned with habeas corpus and the rights of prisoners to attack their convictions in federal courts, an issue that had no relation to the events in Oklahoma. The AEDPA created a number of difficulties for state prisoners seeking federal relief.[43] Prior to the passage of AEDPA, state prisoners seeking to attack their convictions in federal courts on habeas corpus were allowed to do so without time limits. The AEDPA, however, contains a one-year time limit on filing a writ, starting from the date of conviction. Prior to AEDPA, habeas petitioners could file multiple habeas writs over time. Now, state prisoners have a much more difficult time filing more than one writ.[44] Furthermore, under the AEDPA, a federal judge must dismiss any claim previously made in a prior petition; new claims are subject to a "clear and convincing evidence" standard that the claims can set the prisoner free.[45] The AEDPA also greatly restricts the conditions under which a federal

489 U.S. 288 (1989).

[40] *Brown* at 498; J. Parker, "Limiting the Abuse of Habeas Corpus", Federal Rules Decisions 8:171 (1948); W. Speck, "Statistics on Federal Habeas Corpus," *Ohio State Law Journal* 10/1944, 337.

[41] *Ex parte Hawk*, 321 U.S. 114 (1944).

[42] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

[43] L. Adelman, "The Great Writ Diminished," *New England Journal on Criminal and Civil Confinement*," 35/2009, 3–36.

[44] The Habeas Corpus Statute is codified at: 28 U.S.C. sections 2241–2254. See, 28 U.S.C. 2244(d)(1) and 2244(d)(1)(A).

[45] 22449b)(2)(A), (B)(i)-(ii).

habeas court can convene an evidentiary hearing, as well as altering substantially the exhaustion requirement. Finally, the AEDPA limits the reasons for granting the writ.[46]

The destruction of the Murrah Federal Building gave Congress the impetus it needed to restrict the right of prisoners under the guise of limiting the ability of terrorists to attack their convictions in the federal courts.[47] In many ways, the AEDPA tracked the Supreme Court's most restrictive decisions regarding habeas corpus from the 1970s onward. But by mingling the rights of prisoners with terrorism concerns, the AEDPA also brought to light the historic aspects of habeas corpus – that the writ is not only about "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."[48] Habeas corpus is also a writ that protects against all manner of arbitrary arrest, beginning with, most basically, the right of the executive to hold those who he deems pose a threat to the safety and security of the nation. The writ, in other words, is a check not on executive power only, but on any arbitrary use of power by an executive, whether it is the cop on the street, the state prosecutor, or the president of the United States. The kind of history that encompasses the writ's largest purview, I suggest, leads to the conclusion that habeas is only partly about rights, but mostly about power – institutional power – the power, that is, to decide "who has the body".

The purpose of the preceding was to lay out the significant factors that habeas corpus has labored under as it made its way to Guantanamo Bay, Cuba, following the creation in 2002, by the United States, of a penal colony for terrorists that was intentionally designed to prevent prisoners from obtaining judicial relief.[49] Although used mainly today by state prisoners alleging constitutional violations in the administration of criminal justice, habeas corpus derives its power from attacking unlawful executive power, in whatever guise it assumes. At bottom, what is the administration of criminal justice but executive power? The leap from a tool of state prisoners seeking to deny final judgment to a way for suspected terrorists to attack their detention by the full force of the American army is not as large as it appears.

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[46] 2254(e)(2) and 2–3; and 2254(d)(1)-(2).

[47] S. Labaton, "New Limits on Prisoner Appeals: Major Shift of Power from United States to states," *New York Times*, April 19, 1996, B8; M. Wines, G.O.P. Has Tentative Deal on Terrorism Bill," *New York Times*, April 13, 1996, 10.

[48] *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

[49] J. Yoo, *War By Other Means: An Insider's Account of the War on Terror*, Atlantic Monthly Press, New York 2006.

## 2. HABEAS CORPUS AND THE WAR ON TERRORISM

On October 26, 2001, just six weeks after the events of September 11, 2001, President George W. Bush signed the USA PATRIOT ACT, which apart from its antiterrorism provisions also restricts the writ of habeas corpus for resident aliens.[50] The thrust of the act was to plug up the holes in the assortment of anti-terrorist laws Congress had passed in the previous decade, including AEDPA. Section 411 of the Patriot Act allows the government to deport resident aliens who have unknowingly associated with a "terrorist organization." Section 412 gives the Attorney General the power to determine who is a terrorist. Before the Patriot Act passed Congress, only persons associated with groups designated as terrorist organizations by the State Department could be deported. Section 412 also gives the Attorney General the power to detain "any alien" whom the Attorney General has "reasonable grounds to believe" may pose a danger to U.S. security. The Attorney General can hold the alien for seven days without charging him or her with a crime. In the event that no country takes the alien, the alien can be held indefinitely and without trial.[51] No judicial review is allowed by section 412, though the right to petition for habeas corpus remains intact. Indeed, the Supreme Court has declared, in *INS v St. Cyr* (2001), that aliens detained in the United States have a constitutional right to petition a federal court for habeas corpus.[52] It is difficult, however, to say what this really means. If an alien can be held incommunicado and without an attorney, how will the habeas petition be filed? And at what point?

Sections 411 and 412 are important parts of the Patriot Act that call into question the degree to which civil liberties will be protected during wartime. But they are not the core of the government's challenge to civil liberties or part of the dilemma the Supreme Court encountered in the cases arising out of Guantánamo Bay, Cuba, where the government keeps "enemy combatants" captured during the war in Iraq and Afghanistan. President Bush's declaration, on November 13, 2001, declaring an "extraordinary emergency" that arose out of the attack against the United States on September 11th, 2001, has had important ramifications for civil

[50] The full name of the USA PATRIOT ACT is Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, Pub. L. No. 107–56.

[51] J. Zelman, "Recent Developments in International Law: Anti-Terrorism Legislation-Part Two: The Impact and Consequences," *Journal of Transnational Law & Policy,* 11(2)/ 2002, 421–441.

[52] *INS v. St. Cyr, 533 U.S. 289 (2001); Hiroshi Motomura,* "The Rights of Others: Legal Claims and Immigration Outside the Law," *Duke Law Journal* 59/2010, 1723–1786.

liberties and habeas corpus.[53] President Bush's speech in November 2001, targeting terrorists all over the world – "If anybody harbors a terrorist, they're a terrorist. If they fund a terrorist, they're a terrorist. If they house terrorists, they're terrorists. . . . If they develop weapons of mass destruction that will be used to terrorize nations, they will be held accountable"[54] – was of a piece with his military order of November 13, 2001, allowing the secretary of defense to hold and later try under military commission any "individual subject" who is not a United States citizen but who is a member of Al Qaeda, or who has "engaged in, aided or abetted, or conspired to commit, acts of international terrorism," or who aims to cause injury to American citizens, or who has "knowingly harbored one or more individuals".[55]

The President's declaration defined "individuals subject to this order" as any individual who is "not a United States citizen" as determined by the President. The President's declaration also created special military tribunals to try non-citizens suspected of terrorism. The military order gives the President and the Secretary of Defense various powers over detainees, such as identifying the persons subject to the military order; the creation of the rules and procedures under which the trial will be conducted; the appointment of the judges and lawyers for both sides; the power to determine both the sentence and the grounds for appeal; and to conduct the trial in secret. Most importantly, the military order is directed at non-U.S. citizens, which could include permanent legal aliens, as well as those entitled to citizenship who have not yet received it. The military order clearly interferes with aliens' rights to counsel, to self-incrimination, and to habeas corpus. Perhaps even more importantly, two laws, the Detainee Treatment Act (DTA) (2005)[56] and the Military Commissions Act (MCA) (2006),[57] prevent alien detainees from petitioning for the writ of habeas corpus, though they are allowed to petition the United States Court of Appeals for the District of Columbia for review of their status, following a judgment of conviction by a military tribunal. This means that some detainees can be held indefinitely, without a court ever reviewing the case. Habeas corpus would provide a different protection.

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[53] "Second Circuit Rejection of Presidential Power to Declare U.S. National 'Enemy Combatant'," *The American Journal of International Law*, 98(1)/2004, 186–188.

[54] Quoted in C. Pena, "Axis of Evil: Threat or Chimera?" *Mediterranean Quarterly* 13(3)/2002, 40–57, 39–40.

[55] "President Issues Military Order" (November 13, 2001). Online at the Avalon Project: Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; November 13, 2001 (*http: www.yale.edu/lawweb/avalon/sept_11/mil_ord?001.htm*).

[56] Pub. L. No. 109–148.

[57] Pub. L. No. 109–366, 120 Stat. 2600.

## 3. THE GUANTANAMO CASES

The cases arising from Guantanamo Bay were not, by American experience, typical habeas corpus cases. They did not involve federalism issues. But much of the language regarding balancing interests was present. Rather than state versus federal interests, however, the cases tried to balance questions of U.S. law versus international treaties and executive power versus the judicial enforcement of rights. How, then, to conceive of habeas corpus under a regime of law now – and for the foreseeable future – dominated by terrorism?

The key questions of the four Guantanamo Bay cases – *Hamdi* v. *Rumsfeld* (2004),[58] *Rasul* v. *Bush* (2004),[59] *Hamdan* v. *Rumsfeld* (2006),[60] and *Boumediene* v. *Bush* (2008)[61] – all involve access to habeas corpus brought on by executive detention over the wars in Afghanistan and Iraq. Another case, *Padilla* v. *Rumsfeld* (2004), along with *Rasul*, held that detainees with American citizenship could seek habeas relief in federal courts, even though captured abroad and held in military prisons in the United States.[62] But those two cases were immediately overshadowed by the cases that came after 2005. *Hamdan* and *Boumediene,* in particular, provide interesting insight into the Supreme Court's understanding of habeas corpus in the age of terror. To understand the Court's ruling in *Boumediene*, it is necessary to provide background on the two congressional acts mentioned above, as well as to explain what the Supreme Court's ruling in *Hamdan* v. *Rumsfeld* meant.

After September 11, 2001, President Bush issued a military order that authorized the use of military tribunals for those captured in Afghanistan or Iraq.[63] From the standpoint of military history, the creation of military tribunals for those detained in Guantanamo Bay seems aberrational. In general, "military commissions have been employed where U.S. armed forces have established a military government or martial law, as in the war with Mexico, the Civil War, the Philippine Insurrection and in occupied Germany and Japan after World War II."[64] The Supreme Court took note of the idiosyncratic uses of military commissions at Guantanamo Bay in its opinion in *Hamdan* v. *Rumsfeld*, noting that "Exigency alone ... will not

[58] *Hamdi* v. *Rumsfeld*, 542 507 (2004).

[59] *Rasul* v. *Bush*, 542 U.S. 466 (2004).

[60] *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006).

[61] Boumediene v. Bush, 128 S.Ct. 2229.

[62] *Padilla* v. *Rumsfeld*., 542 U.S. 426 (2004).

[63] Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, sec. 1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[64] J. Elsea, "The Military Commissions Act of 2006: Background and Proposed Amendments", *Congressional Research Report for Congress*, 1–51, 2.

justify the establishment and use of penal tribunals not contemplated by Article I, §8 and Article III, §1 of the Constitution."[65] The Court, however, refrained from deciding the question whether it was within the President's powers to create military tribunals in this instance. Instead, it held that military tribunals are subject to the laws of war, and the Uniform Code of Military Justice and the Geneva Conventions bracket the laws of war. The Court, moreover, finding that the charge of conspiracy against Hamdan "must have been committed both in a theater of war and *during*, not before, the relevant conflict,"[66] held that the military commissions established by the Bush administration for use in Guantanamo Bay, Cuba, lacked "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949."[67] Insofar as the commissions do not faithfully and accurately adhere to the wording in these documents, the military commissions in place to try Hamdan were declared unconstitutional.

In 2005, Congress passed the Detainee Treatment Act (DTA).[68] Although the act prohibits American officials from treating inhumanely detainees in the war on terror,[69] section 1005(e) of the DTA prohibits aliens detained in Guantanamo Bay from applying for a writ of habeas corpus. It states, in part: "[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba".[70]

Congress passed this law in part at the instigation of the members of the *Hamdan* opinion who were not fully in agreement with the Court's majority opinion. Concurring in *Hamdan*, Justice Steven Breyer wrote: "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[71] Congress took up Justice Breyer's argument, and in 2006, passed the MCA.[72] Section 948(b) states: "the President is authorized to establish military commissions under this chapter for offenses triable by

[65] *Hamdan* at 591.

[66] *Hamdan*, at 563, italics in original.

[67] *Hamdan* at 613.

[68] Detainee Treatment Act of 2005, Pub. L. No. 109–148, §§ 1001–1006 (2005). available at *http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&*.

[69] P.L. 109–148. Title X, section 1002 (2005); P.L. 109–163, Title XI, sec. 1402 (2006).

[70] §1005(e)(1), 119 Stat. 2742.

[71] *Hamdan* at 636.

[72] Pub. L. No. 109–366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 of the United States Code (as well as amending section 2241 of title 28).

military commission as provided in this chapter." Section 948(c) states: "Any alien unlawful enemy combatant is subject to trial by military commission under this chapter." Section 948(a) states:

> The term "unlawful enemy combatant" means –
>
> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.
>
> The term "lawful enemy combatant" means a person who is –
>
> (A) a member of the regular forces of a State party engaged in hostilities against the United States;
>
> (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
>
> (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.[73]

In *Boumediene*, Justice Anthony Kennedy acknowledged that the MCA was a legitimate expression of congressional power. "[W]e cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases.[74]

Although the idea that the Supreme Court may not have jurisdiction over detainees held by U.S. armed forces was considered a "threshold question," one that the Court must answer before proceeding to analyze the merits of the petitioner's case, the Court in fact turned the decision into a history lesson on the subject of habeas corpus.

In October 2001, Lakhdar Boumediene, an Algerian-born citizen of Bosnia was arrested in Bosnia, with five other Algerians (four of whom had Bosnian citizenship), for planning to bomb the American Embassy in Bosnia. After an investigation by the Bosnian police, the Bosnian Supreme Court ordered the six men released and not to be deported. In fact, right after their release from jail, they were seized and sent to Guantanamo Bay. "It was alleged in a tribunal hearing that an unidentified source

[73] MCA, chapters 47A, sections 948a.

[74] *Boumediene* at 2243.

had said Mr. Boumediene 'was known to be one of the closest associates of an al-Qaeda member in Europe'."[75]

Justice Kennedy began his opinion in *Boumediene* by noting that "freedom from unlawful restraint" is a "fundamental precept of liberty" and that the writ of habeas corpus "is a vital instrument to secure that freedom."[76] He noted that the history of the writ in England was "painstaking"[77]; that it involved a classic struggle between kings and parliaments over the jurisdiction of subjects. He quoted Blackstone: that the arbitrary use of the power to deprive a man of liberty is tyranny.[78] The careful student of habeas's history could see in which direction Justice Kennedy was headed.

In the American context, Justice Kennedy turned not to the law governing habeas corpus in the congressional statutes, riddled as it is with concerns over crime and federalism, but to the Constitution's suspension clause, Article I, section 9, which states: "The privilege of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The clause has rarely been used in American constitutional law because Congress and the President have only rarely suspended the writ.[79] More troubling, however, is that the Suspension Clause may not have real, judicial meaning. As Paul Halliday and G. Edward White have written, "the Suspension Clause does not itself confer jurisdiction on any court to enforce the 'privilege of the writ'."[80] But the Court held that the Suspension Clause's meaning is tied to the historic events that took place in England during the seventeenth century, and as such, it is an instrument of power against unlawful executive detention. Thus, in *Rasul* v. *Bush*, the Court made it clear that the habeas writ that Rasul was applying for was not the statutory kind, with its lawful restrictions on jurisdiction and the rights of prisoners, but the constitutional version – the one that cannot be suspended unless Congress or the President declares a rebellion – and that therefore held that, as a non-U.S. citizen captured in Afghanistan but held in Guantanamo Bay, Rasul could rightfully apply for the writ.[81] For Kennedy, then, quoting from the

[75] Quoted in BBC News, online, "Profiles: Odah and Boumediene." *http://news.bbc.co.uk/2/hi/7120713.stm*.

[76] *Boumediene* at 2244.

[77] *Boumediene* at 2244.

[78] *Boumediene* at 2246.

[79] See S.G. Fisher, "Suppression of the Writ of Habeas Corpus During the War of the Rebellion", *Political Science Quarterly*, 3/1888, 454–488.

[80] P. Halliday, G.E. White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," Social Science Research Network, *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252*.

[81] *Rasul* at 475–477; K. Roosevelt III, "Application of the Constitutions to Guantanamo Bay," *University of Pennsylvania Law Review* 153/2005, 2017–2071.

Court's decision in *Hamdi*, the meaning of the Suspension Clause is that "it ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[82]

Having established that the judicial branch of government has final say on unlawful detentions not covered by the habeas statute, Justice Kennedy turned to the arguments at hand. Is the law denying detainees of the right to petition for habeas corpus with an American federal court constitutional? At about the time the Constitution was being written, Justice Kennedy wrote, the law regarding habeas corpus in Scotland, for example, was that English courts lacked the power to issue writs because Scotland was a "foreign" entity for legal purposes. Was the situation the same with cases from Guantanamo Bay? Justice Kennedy dismissed the connection, raised by the Government, that the limitations on habeas in one historical instance applied, *mutatis mutandis*, to the situation in Guantanamo. According to Justice Kennedy, the lack of power to issue the writ in Scotland was not a formal legal prohibition as much as it was a practical one: "prudential considerations would have weighed heavily when courts sitting in England received habeas petitions from Scotland."[83]

Having dismissed the argument that courts in the United States cannot be barred from issuing writs from Guantanamo Bay, Cuba,[84] Justice Kennedy turned to the legal status of Guantanamo Bay. "Guantanamo Bay is not formally part of the United States," he wrote. Cuba retains "'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control'."[85] Indeed, "for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay."[86] But this acknowledgement did not prevent a majority of the Court from concluding that writs emanating from Guantanamo Bay have judicial status.

What is the status of those non-American detainees held in domains that are not part of American sovereignty but in which the U.S. exercises sole prerogative powers? Regarding American citizens, the Court declared, in *Hamdi* v. *Rumsfeld*: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[87] But few of the cases from either

[82] *Boumediene* at 2247.

[83] *Boumediene* at 2250.

[84] *U.S.* v *Bitty*, 208 U.S. 393 (1908); J. Elsea, "Guantanamo Detainees: Habeas Corpus Challenges in Federal Court," *Congressional Research Service for Congress*, 1–25, 22.

[85] *Boumediene* at 2252.

[86] *Boumediene* at 2253.

[87] *Hamdi* at 536.

Guantanamo Bay or Afghanistan involve American citizens, and the Court has been clear that American citizens are entitled to the full protections of the Constitution.[88]

The real meaning of the writ in the age of Guantanamo, then, comes down to the question of the rights of non-American detainees held in distant lands. For the potential quagmire cannot be ignored: "if habeas were available to non-citizens worldwide, it could in theory (if not always in practice) be pressed in both conventional wars, in which their might be thousands of alien captives, and with respect to such sensitive activities as foreign espionage."[89]

In two cases from World War II, *Eisentrager* v. *Johnson* (1950) and *Ex parte Quirin* (1942), the question of jurisdiction and foreign citizenship were present. In *Eisentrager* v. *Johnson*, some German nationals, captured by U.S. forces in China during World War II, petitioned a District Court in Washington, D.C. for habeas corpus. The military had already tried them by military commission, where they were found guilty of war crimes and repatriated to Germany. The Court of Appeals reversed the District Court's denial of the writ, declaring that enemy aliens, held by U.S. forces, are entitled to the writ. But the Supreme Court reversed the Court of Appeals. The question before the Supreme Court was whether "enemy aliens" can petition for habeas corpus, even though they were not U.S. citizens, were captured outside of the territory of the United States, and remained imprisoned outside the United States. In *Ex parte Quirin*, seven German nationals and one German with an American passport, entered the United States from a submarine, parked off the coast of Florida. They were captured and tried by military tribunal. The Supreme Court upheld the right of the government to try these spies by military commission, based on congressional approval of the military commissions. "*Ex parte Quirin* stands for the proposition that enemy combatants can be tried by military commissions created by executive decree, regardless of whether they are American citizens."[90] In rejecting the petitioners' habeas petitions in both cases, the Court held that, to extend habeas's reach to those not held in the United States would confer Fifth Amendment rights "on all the world".[91]

When non-American detainees in Guantanamo Bay began to petition federal courts in the United States for writs of habeas corpus, *Eisentrager* became the case to look to, as its holding that foreign nationals held abroad have no right to habeas corpus is exactly what the Bush administration was attempting to do with the Guantanamo detainees and

[88] *Padilla* v. *Rumsfeld*, 542 U.S. 426 (2004).

[89] R. Fallon and D. Meltzer, "Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror," *Harvard Law Review* 120, 2007, 2029–2112, 2057.

[90] Federman, *The Body and the State*, 170.

[91] *Eisentrager* v. *Johnson*, 339 U.S. 763, 784 (1950).

those held in Afghanistan and Iraq. Thus, the question in *Rasul* v. *Bush* was: "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[92] While the Supreme Court was a far more conservative Court than the fairly liberal Stone Court that ruled in *Eisentrager*, and therefore more willing to defer to the president during wartime, the times had changed, and so had the circumstances of detentions. There are important differences, the Court noted in *Boumediene*, between *Rasul* and *Eisentrager*:

> The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager,* there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.[93]

The Supreme Court in *Rasul* had a different set of facts, and ruled differently. As Justice John Paul Stevens noted, on the facts established in *Eisentrager*, "no right to the writ of *habeas corpus* appears."[94] But the facts are now different. The Court held in *Rasul* that *Eisentrager* was not directly applicable to the facts in *Rasul* because in *Eisentrager*, the detainees were at war with the U.S., but that that was not the case with the detainees in *Rasul*, not all of whom belonged to a country at war with the U.S. Moreover, in *Eisentrager*, the detainees were given some access to a hearing and charged with their crimes, which the detainees in *Rasul* were not.[95] Perhaps most critically, the difference between *Eisentrager* and *Rasul* was that the statutory "gaps" that existed to bestow habeas corpus on foreign nationals held outside the U.S. – on the basis of the Suspension Clause's understanding that habeas corpus is always available, barring suspension during times of rebellion – were filled in during the ensuing years. In *Braden* v. *30th Judicial Circuit of Kentucky* (1973),[96] a case

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92 *Rasul* at 475.

93 *Boumediene* at 2260. Footnotes omitted.

94 *Rasul* at 476.

95 *Rasul* at 467.

96 *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484 (1973).

that came after *Eisentrager*, the Court held that because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of §2241 as long as "the custodian can be reached by service of process."[97] The writ, it should be recalled, works against the person holding the detainee; it does not work for the detainee. By this logic, the writ can reach Cuba by way of the person or persons responsible for managing the detention of those held at Guantanamo Bay. To be sure, the *Rasul* opinion is not clear just how far habeas corpus can reach – to Cuba because of Guantanamo Bay, or beyond? Justice Stevens therefore held in *Rasul*, for the Court, that "aliens held at the base, no less than American citizens, are entitled to federal courts' authority under section 2241".[98]

The Court in *Boumediene* did not offer an alternative set of proposals for a habeas corpus substitute for detainees. The tribunals, insofar as they are constitutional, must conform to the demands of the habeas statute as set forth by congressional law. Those held in Guantanamo Bay and elsewhere by U.S. forces must be subject to the requirements of international law and the basic liberties of all Americans held in prisons. "We do consider it uncontroversial," Justice Kennedy wrote in conclusion, "that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[99] The determination of unlawful detention remains a judicial function, not an executive prerogative. A "habeas court must have the power to order the conditional release of an individual unlawfully detained," while noting that release does not have to the exclusive remedy for the writ's success.[100]

## 4. CONCLUSION

Under the Constitution, habeas corpus is inert. To give it life, it requires a live person, an accused person or a convicted rights violator, someone, in other words, who has interfered with the working of the law. The writ lives off those who seek its power, gaining meaning not from one source, but from any source: the prisoner, wherever he may be, has, at the end of the line, the right to petition a court for review. At that point, with dirty hands, habeas corpus gains meaning. "Remote in time it may be; irrelevant to the present it is not",[101] Justice Kennedy wrote in *Bou-*

[97] *Braden* at 494, 495.

[98] *Rasul* at 480.

[99] *Boumediene* at 2266.

[100] *Boumediene* at 2238.

[101] *Boumediene* at 2276.

*mediene*. The Guantanamo Bay cases, despite their differences, have brought habeas corpus back to its roots, as a check on unlawful executive power. One may quibble with the Court on a number of issues raised from Guantanamo, but at its historical core, the writ of habeas corpus serves "as a means of reviewing the legality of executive detention".[102]

[102] *St. Cyr* at 301.