The Power of Habeas Corpus in America
From the King’s Prerogative to the War on Terror

Anthony Gregory
Despite its mystique as the greatest Anglo-American legal protection, habeas corpus provides a history featuring opportunistic power plays, political hypocrisy, ad hoc jurisprudence, and many failures in effectively securing individual liberty. *The Power of Habeas Corpus in America* tells the story of the writ from medieval England to modern America, crediting the rocky history to the writ’s very nature as a government power. The book weighs in on habeas’s historical controversies – addressing its origins, the relationship between king and parliament, the U.S. Constitution’s Suspension Clause, the writ’s role in the power struggle between the federal government and the states, and the proper scope of federal habeas for state prisoners and for wartime detainees from the Civil War and World War II to the War on Terror. The concluding chapters stress the importance of liberty and detention policy in making the writ more than a tool of power. Taken as a whole, the book presents a more nuanced and critical view of the writ’s history, showing the dark side of this most revered judicial power.

Anthony Gregory is a Research Fellow for The Independent Institute. His articles have appeared in *The Independent Review* and the *Journal of Libertarian Studies* and have been translated into multiple languages, reprinted in textbooks, and used in college courses on law and political science.
Martial or Military Commission:

Second. That the Writ of Habeas Corpus is suspended in respect to all persons arrested or who are now, or hereafter, during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any Court Martial or Military Commission.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-seventh.

Abraham Lincoln

By the President:

William H. Seward,
Secretary of State.
The Power of Habeas Corpus in America

FROM THE KING’S PREROGATIVE TO
THE WAR ON TERROR

ANTHONY GREGORY
The Independent Institute, Oakland, CA

Foreword by Kevin R. C. Gutzman
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*Acknowledgments*  
*Foreword by Kevin R. C. Gutzman*

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Of course, any errors or lapses in judgment are purely the author’s responsibility.
Ask any American what his most important right is, and he is apt to mention the freedom of speech, the freedom of the press, or the freedom of religion. Also much esteemed are the right to vote, the right to keep and bear arms, and various aspects of privacy.

Very rare is the person who would respond by saying, “The right not to be arrested and jailed arbitrarily,” let alone mention the judicial writ that protects that right: the writ of habeas corpus. Lawyers know it as “the Great Writ,” and the myth holds that its availability from time immemorial is the chief reason that Anglophones have long been free.

Anthony Gregory here does the estimable service of showing that the Great Writ was not always what we now understand it to be. He also lays out in excruciating, nay shocking, detail the 150-year trend, accelerating in our day, of reducing the writ’s importance.

The story begins in medieval England, with the birth of several forms of writ of habeas corpus. Most readers will be surprised to learn that in the beginning, the writ’s purpose was not to protect individuals from unjust detention. Rather, the writ began as an instrument for assertion of some courts’ superiority over other courts. Individual Englishmen’s claims had little role in that story.

In time, however, the writ was transmogrified into a mechanism for limiting royal power to detain. Eventually, it formed the germ of the American Patriots’ writ of habeas corpus.

The U.S. Constitution says in Article I, Section 9, Clause 2 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.” Gregory’s book demonstrates, among other things, that this provision raises more questions than it answers.

For example, whose writ? No other clause of the Constitution expressly empowers a federal court to issue such a writ. Indeed, the Constitution does not require that there be any federal courts other than the Supreme Court, and suits for writ of
habeas corpus are not among the types of suits over which the Constitution grants the Supreme Court original jurisdiction.

Perhaps the Framers contemplated federal suspension of state writs of habeas corpus. Here we encounter one of the forgotten realities of eighteenth- and nineteenth-century American legal practice: that it was chiefly state courts that issued writs of habeas corpus, even to federal executive officials.

Thus, for example, it was Northern state legislatures that adopted personal liberty laws to interfere with the implementation of arguably unconstitutional due process-denying provisions of the Fugitive Slave Act of 1850. In republican America, habeas corpus was originally a pre-trial mechanism usually employed by state courts. The federal government began asserting habeas corpus power against state authority with Andrew Jackson’s Force Bill of 1833. (We should note that the only Senate “nay” vote on that bill came from John Tyler of Virginia, who quit Jackson’s Democratic Party immediately thereafter, and who ultimately would earn some liberty-minded scholars’ respect as the best president in American history.1) This trend accelerated with the Supreme Court’s decision *Tarble’s Case* in 1871, where the Court through one of its most eminent justices said that state courts could no longer issue writs of habeas corpus to federal officials.

Of course, contemporary interest in the relatively arcane writ of habeas corpus grew mainly out of the policies of the George W. Bush administration in pursuit of its War on Terror. Anthony Gregory’s account of the writ’s fate in Osama bin Laden’s war is by turns infuriating and distressing.

Within days of September 11, 2001, Congress passed an Authorization for the Use of Military Force (AUMF). The AUMF gave a congressional imprimatur to presidential use of force against participants in the September 11 attacks and their aiders and abettors.

Famously, Bush pushed the argument that the president as commander in chief of the armed forces had various foreign policy–making powers not directly related to leading the military in execution of Congress’s policies. In time, he also took so liberal an approach to the AUMF as to find in it authority for ignoring statutory provisions saying who could be held, what procedural protections they must be given, where they could be held, and how they could be interrogated in pursuit of the War on Terror.

One of the chief casualties of this general approach was the writ of habeas corpus. Bush’s subordinates, like absolutist English Stuart kings of the seventeenth century, repeatedly argued on his behalf that various people did not have a right of access to the writ, and they copied the Stuarts in responding to judicial orders to comply with the writ in certain overseas jails (such as at Guantánamo Bay, Cuba) by moving captives to different overseas jails.

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The roots of conservative contempt for the writ lie in the Warren Court’s abuse of habeas corpus, which Gregory describes. Today’s lawyers are yesterday’s law students who grew up in the law studying the invention of unhistorical “rights” by federal judges in the 1950s, 1960s, and 1970s. Since Richard Nixon’s 1968 presidential campaign, distrust of liberal judges has formed a key component in the right’s criticism of the modern liberal state. Gregory’s account, while not forthrightly critical of Warren Court excesses in this regard, makes clear why they provoked a backlash. So widespread has acceptance of the critique become that triangulating Democratic president Bill Clinton signed the Anti-Terrorism and Effective Death Penalty Act into effect. That legislation seriously abridged Americans’ access to the writ.

First state courts lost their power to review federal detention; then federal judges’ abuse of the writ led the elected branches to curb federal judges’ power to issue the writ; and finally came the War on Terror Executive Branch’s contempt for due process and the writ of habeas corpus. Perhaps most disappointing, though hardly surprising, in Gregory’s account, is the abject failure of President Barack Obama to live up to his campaign criticisms of the Bush administration in this area.

Gregory concludes the story with a perfectly sensible suggestion: that Americans return to the original understanding of the writ of habeas corpus—which made it a key state check on federal power—and make federal judges’ accustomed unwillingness to use the writ against federal officials less significant by abolishing the huge prison complex administered by today’s federal government.

He concedes that achieving this goal would require nothing less than changing the American culture generally. If American governments imprison a higher proportion of their fellow citizens than any other government on earth, this is no accident.

Ultimately, politicians in the United States respond to elective pressure. As Pogo said, “We have met the enemy, and he is us.” In “the land of the free, and the home of the brave,” the flag still waves, but the people’s pulse no longer beats in time with the Fathers’.

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The conflict between the power to detain and the authority to test detentions through habeas corpus writs has provoked impassioned debate for centuries. Questions have reverberated from England to the United States over who has the authority to suspend the writ’s privileges and the very meaning of suspension itself. In our own time, no less than in past generations, jurists and scholars have labored to determine who enjoys the writ’s protection, which executive officials must answer to which courts or judges, what defines habeas jurisdiction, and whether its boundaries should shift during emergency. The struggle that began in England’s royal court system between judicial scrutiny and executive prerogative continues today in America’s war on terror.

There exists a temptation to embrace an oversimplified understanding of these controversies, dividing the literature into two opposing sides. Reflecting on wartime executive detention, some advocate extensive presidential power to classify subjects as “enemy combatants,” deprive them of prisoner-of-war privileges as well as the civil protections of criminal suspects, and try them in military commissions or hold them indefinitely without trial. Others defend broad habeas jurisdiction – including, perhaps, in cases of foreign nationals detained abroad – along with other procedural safeguards.

A similarly simple bifurcation presents itself in the debate over federal habeas review of state criminal convictions that arose after the Civil War and has become more contentious ever since. In this debate, there once again appear to be two camps – those who believe the federal courts should exercise relatively broad review powers over state convictions, and those who, in the name of judicial modesty, federalism, or finality, argue for greater deference to state proceedings.

Both the debate over executive detention policy and the debate over federal review of state convictions seemingly feature two identifiable sides: habeas conservatives who stress judicial restraint and habeas liberals who applaud the federal judge’s authority to vindicate a prisoner’s rights. Yet whether seeking to protect individual liberty or urging judges to abide prudentially to comity and restraint, scholars should
acknowledge the writ’s institutional limits arising from its nature as a judicial order. Habeas corpus has a discomforting history – what could be called a dark side of the writ – because of its very essence as a prerogative command. Focusing on this dark side exposes the writ’s development as one characterized by politicization, unfulfilled promises, legal technicalities, power struggles, and hypocrisy, as much as a story of liberation and justice.

Most habeas debates feature arguments over precedent. This is complicated by the fact that among current legal practices, habeas corpus stands out with a very long history involving shifting power relations that does not always yield simple answers about appropriate current use. Both habeas liberals and habeas conservatives wave the banner of tradition. Liberals look to the Great Writ’s historic role as a flexible, evolving, common-law instrument fashioned by judges in both England and the United States according to the circumstances they faced. If they regard the judicial proceedings lacking on due process grounds or otherwise detect a conspicuous injustice, defenders of broad habeas reach tend to find precedential reasons to argue for review.

In contrast, conservatives argue that the U.S. Constitution and Congress regulate the judiciary and that courts possess limited common law powers over wartime detentions. Looking to criminal convictions, they argue that America’s decentralized legal system demands that federal judges respect state institutions. If state proceedings appear legitimate, a convict seems guilty despite flaws in procedure, or the president has detained someone in the name of national security, the courts should defer. Conservatives have precedent to back these arguments. They point to the limits of habeas under English common law, for example, in their opposition to judicial jurisdiction over accused terrorists.

Because of the peculiar way the writ became adopted by the American colonies, recognized in the U.S. Constitution, and modified by Supreme Court decisions, federal statute, and executive claims of power at wartime, historical precedent does not always clearly side with either camp in these controversies.

Defenders of broad habeas reach have plenty of good arguments. Habeas corpus did in fact emerge out of something resembling judicial activism in the United States and Britain. The statutory and even constitutional restrictions on its use must reckon with a counter-history, as habeas corpus is indeed a “writ antecedent to statute...throwing its root deep into the genius of our common law.” Judges eager to exercise broad habeas jurisdiction always faced conservative limits placed on them by the executive and later by Parliament and Congress, but this tension itself

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1 Supreme Court Justice Antonin Scalia notes in his dissent to Boumediene v. Bush that the English writ did not reach to Scotland in the late eighteenth century. Accordingly, the U.S. writ, if it is to follow the traditions of its English antecedent, should not extend to Guantánamo today. 553 U.S. 723, 835, note 3 (2008) (Scalia dissenting). Scotland, however, had its own fully formed, distinct legal system, unlike Guantánamo Bay.

underscores the very struggle over liberty that habeas controversies have come to symbolize over the centuries. Moreover, when it comes to U.S. presidential power and original intent, the most glaring historical argument against conservatives is almost never raised. Before the late 1850s, the state courts enjoyed habeas review power over federal detentions. The advocacy of a wartime detention power unchecked by federal courts ignores the role state courts used to have in checking even military commitments.

Habeas conservatives, on the other hand, contend that the federal courts were not designed to have wide latitude over state court proceedings. In response, some scholars have argued that upon ratification of the Constitution, the federal judiciary already had the authority it has now – and that, by extension, Chief Justice John Marshall wrongly decided *Ex parte Bollman*, which has continued to restrict the Court’s role improperly. But many other champions of broad habeas authority see this as wishful thinking. In any event, habeas corpus has indeed always been far more limited than its advocates would like to believe. Executive power in many, if not most, instances escaped the effective constraints of habeas corpus – both in England and in the United States, particularly in wartime. In the Civil War and World War II, U.S. presidents exercised detention powers more constrained than those of modern presidents only if the distinctions turn on narrow legal technicalities. In terms of broader principles, proponents of judicial restraint can point to a whole history of executive supremacy.

Popular confusion among the Great Writ’s well-meaning enthusiasts stands as a mainstream manifestation of scholarly imprecision. A bumper sticker from a few years ago reads: “Habeas Corpus: 1215–2006,” implying that the Great Writ was alive and well from the Magna Carta all the way until President Bush signed the Military Commissions Act of 2006. Yet habeas corpus is not a clear-cut doctrine that either exists in full force or ceases to exist at all. To the contrary, it was always a weaker remedy than its optimistic supporters admitted. For centuries, its advocates have wished to hearken back to a golden age of habeas corpus that never truly was.

For its many successes in protecting individual liberty, habeas has taken on something of a mythic status throughout Anglo-American history. Sir William Blackstone called its legal establishment “another Magna Carta” and the remedy “efficacious...in all manners of illegal confinement.” Sir William Holdsworth called it “the most effectual protector of the liberty of the subject that any legal system has ever devised.” Alexander Hamilton thought it should be “provided for in the

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4 Hertz and Liebman, 22.
most ample manner" against “arbitrary methods of prosecuting pretended offenses, and arbitrary punishment upon arbitrary convictions.” In Sir Henry Neville’s *Plato* a character celebrates: “You have made an act here lately about imprisonments; that every person shall have his habeas corpus . . . so that no man, for what occasion soever, can lie in prison above a night, but the cause must be revealed, though there be great cause for the concealing it.” Yet habeas relief was often not so effective, immediate, or comprehensive.

Scholars have illustrated habeas’s boundaries but most have ignored the in-escapable reason for such limits. Habeas stubbornly envelops a paradox: It is a tool known for its service to liberty yet at its core is a governmental power. The Great Writ is famous for ensuring that detentions are legitimate – as “an attack by a person in custody upon the legality of that custody . . . to secure release from illegal custody,” a role that presumably preempts an all-powerful state. Yet the literal meaning of the words is a judicial command. The Latin words translate into, “you [shall] have the body.” The forcefulness of this command, directed toward the state’s detention power, has garnered admiration from lovers of liberty. Yet it entails an authoritarian element.

Despite its mythic status, the typical habeas process is rather unromantic. A prisoner or detainee petitions for a writ. A judge with the proper authority over the subject, upon receiving the petition, decides whether to issue it. The writ, once issued, goes to the custodian detaining the prisoner, who usually submits a return – a response to the judge justifying the detention. If the judge is satisfied, the procedure typically ends there, the detainee remanded back to the custodian’s control. If the judge is unsatisfied, he might order the detainee released, or order the custodian to clarify his reasoning, or choose another course of action. The entire undertaking involves one authority claiming jurisdiction over another, usually in a very formalistic manner. For every vindication of a custodian’s power, the authority to detain is upheld. For every undermining of a custodian’s power, there is the affirmation of another official’s power – a judge’s power, to say nothing of the state’s general power to decide whom to detain. In this act, judges have often exercised great prerogative of their own.

Because habeas became known as a collateral attack, coming in from the side to scrutinize an ongoing process, that operated when “normal legal remedies were unavailable or inadequate,” the writ has earned a special reputation – almost as

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6 Hertz and Liebman, 22.
9 Before the American Revolution, it was a “prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention.” According to S. A. DeSmith, it was first called a “prerogative writ” in 1620 by Chief Justice Montague in *Richard Bourn’s Case*. William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, CT: Greenwood Press, 1980), 4, 6–7.
though it functions at a level above the rest of the legal system. Yet courts have done their share to limit the reach of habeas and to approve detentions resulting from both questionable criminal convictions and novel exercises of administrative power. For most of U.S. history, petitioners for the writ have not automatically been heard. Habeas corpus has been characterized as a writ of right, not of course. A petitioner’s claims must satisfy the judge or court and only then will the writ issue. It is an extraordinary remedy: judges will not hear what they regard as frivolous cases, and may exercise more discretion than that.

The many technicalities that determine habeas’s precise use remind us that the device has as much to do with judicial authority and politics as with liberation. In addition to the judge’s discretion, habeas corpus is bound by formalities, tradition, and its idiosyncratic origins – a practice developing over seven centuries of patchwork legislation, executive edicts, and judges grabbing power. Habeas’s multifaceted and complicated evolution has added to its mythical status, although another result has been a somewhat awkward identity for this supposedly Great Writ. Although most often involved in criminal justice, it is a civil remedy, typically used alongside an appeal or review process, to come in from the side and question an executive detention or criminal conviction in court. Most modern habeas corpus cases in the United States have come to resemble an appeals process. Habeas’s non-linear history has rendered it “a civil, appellate, collateral, equitable, common law, and statutory procedure,”\(^\text{10}\) thus making everything about it more difficult to delineate.

Although habeas has gained an idealistic mystique, scholars have long been aware that it takes place within imperfect legal systems and orders – all of them inextricably tied to the exercise of power, a fickle instrument in ensuring liberty. Recent literature on habeas corpus implicitly bolsters the case that power deserves a central place in analyzing the writ, but none of it makes the argument directly and accounts for all of habeas history under this unifying framework. Paul D. Halliday’s *Habeas Corpus: From England to Empire* is indispensable for documenting Parliament’s propensity to imprison, demystifying the Habeas Corpus Act of 1679,\(^\text{11}\) and revealing the imperial nature of England’s writ, although it provides neither much analysis of the United States nor an overarching lesson about power. Eric M. Freedman’s well-researched *Habeas Corpus: Rethinking the Great Writ of Liberty* reminds readers of the radical jurisdictional switch that occurred between states and the federal government, a revolution in power relations that would appear “odd...to modern lawyers,” yet this is very tangential, if not detrimental, to his thesis.\(^\text{12}\) Cary Federman’s unique and fascinating *The Body and the State* draws philosophical implications from the writ’s connection to power, but appears to find anti-authoritarian meaning in the writ’s

\(^{10}\) Hertz and Liebman, 22.


centralizing tendency without acknowledging fully the ironic affirmation of power that it also implies.\textsuperscript{13}

Jonathan Hafetz’s \textit{Habeas Corpus After 9/11}, a masterful treatment of executive anti-terror detention policy, devotes a chapter to habeas’s limits in retraining the “elusive custodian.” Hafetz notes that the writ paradoxically encourages “the state to structure its detention operations to avoid habeas corpus altogether” and can “even legitimize the very abuses that it is meant to prevent by giving illegal executive action a judicial stamp of approval.”\textsuperscript{14} Yet Hafetz maintains a hopeful tone about the federal court’s potential to restrain the executive, perhaps not fully acknowledging the historical impotence of judicial review. Nancy J. King and Joseph L. Hoffman’s \textit{Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ} compellingly reveals the “costly charade” that federal review of state convictions has become.\textsuperscript{15} The authors do not, however, attempt to explain today’s habeas complications firmly in the context of centuries of power relations, including the writ’s nationalization in the nineteenth century.\textsuperscript{16} Justin Wert’s \textit{Habeas Corpus in America} comes closest to honing in on power, as its thesis concerns habeas corpus as a politically driven institution. Wert argues that the “writ implicates elements of governmental authority, legitimacy, and individual rights that every political regime seeks to reformulate and then enforce, both politically and legally.”\textsuperscript{17} Yet Wert complicates his thesis, drawing distinctions between eras of Supreme Court deference to the political branches and periods when it defends its own institutional integrity, although both political and institutional forces could more simply be unified under the rubric of power.

Habeas corpus remains the most celebrated of judicial mechanisms in Anglo-American history. In today’s debates over wartime detention powers, and in all the contemporary debates over federal review of state detentions, both broad traditional principles and nuances of law and jurisprudence come into play. But habeas corpus presents a much rockier history than one might want to ascribe to such a revered writ. For every individual wrongly detained who gets relief, habeas enthusiasts must cheer. In the main, however, this is not the history of the so-called Great Writ. It originated in service to power and has been used to secure slavery. Its most inspiring episodes were often short-lived, historical aberrations. It has been suspended, usurped, and ignored by hypocrites who tout it one day and reject it the next. For every prisoner protected


\textsuperscript{16} For example, the authors barely discuss state habeas review of federal convictions before \textit{Tarble’s Case}, deferring to the Supreme Court’s jurisprudence (King and Hoffman, 175, note 31).

by the writ, many, many more were neglected. This book seeks to tell the history of habeas corpus with both an emphasis on power and a recognition of individual liberty’s importance, addressing many scholarly controversies along the way.

The formation of the writ amidst competing jurisdictions, its development in the royal court system, and its perversion by the very Parliamentarians celebrated as its defenders all illustrate the dubious record of habeas as a writ of liberty in English history. Its decentralist adoption in colonial America was in many respects the exception that proves the rule, as the creation of the American Republic and the inclusion of the Suspension Clause in the Constitution soon enough put habeas back on the path to becoming a tool of usurpation and centralization. In antebellum America, the writ’s employment to preserve as well as undermine slavery, and the shifting balance from its character as a states’ right toward becoming a federal power, further demonstrated habeas’s dark side. The Civil War and Reconstruction occasioned the writ’s final nationalization – the suspension of the writ when it was most needed, the abolition via Tarble’s Case of its revolutionary use as a state check on federal detention, the amplification of its use as a national check on state authority, and the curtailing of its effectiveness as soon as it compromised nationalist interests.

The era between the Civil War and World War II, a period frequently characterized as a lull in habeas history, raises new questions about power and liberty in federal habeas review, the detention state, and racial injustice. The nationalization of law produced benefits to civil liberty, but also many negatives. World War II, foreshadowing the era of greatest federal habeas activism, presents us with the failure of habeas to check executive detention when it was most needed – against martial law in Hawaii, military commissions at home, and Japanese Internment. The postwar era saw a qualified broadening of habeas protections alongside an expansion of federal power, only to reverse itself at the twilight of century’s end with the Anti-Terrorism and Effective Death Penalty Act. Throughout all this history, told in Part I of this book, the focus on power dynamics sheds a new light on the debates concerning executive authority, federal deference to state criminal proceedings, and the origins and development of habeas.

After 9/11, the emphasis on executive wartime detentions once again dominated habeas discourse. Part II exposes the many weaknesses of habeas as a check on this power. The roundup of aliens immediately after the terrorist attacks and the ad hoc reasoning behind the treatment of citizen prisoners John Walker Lindh, Jose Padilla, and Yaser Hamdi remind us how impotent habeas can be in vindicating the rights of most individuals detained by executive prerogative. The novel legal theories constructed by the Bush administration to circumvent habeas corpus for “enemy combatants” housed at Guantánamo Bay are but a recent manifestation of the executive’s historical tendency to skirt the liberating spirit of habeas. Although the Supreme Court’s multiple decisions in 2004, 2006, and 2008 have been celebrated as repudiations of the Bush policy, in many respects they guided the executive and legislature to contrive more novel methods of detaining prisoners nearly indefinitely,
and further serve as examples of habeas’s failure to rescue most deserving subjects. President Obama’s first term, which began amidst great hopes of significant reversals on detention policy, is the latest chapter in the recurring theme of habeas hypocrisy. Throughout the war on terror, the executive branch’s arguments are often weak on legal grounds but not as lacking in precedent as habeas enthusiasts might wish to believe.

In light of its shaky history and impotence in the war on terror today, habeas deserves a reassessment, which Part III provides. The paradox of habeas corpus as both an engine of and curb on state power is a good place to start in understanding the state’s detention abuses and what can be done to restrain them. If we care about individual liberty, we must filter from habeas’s mixed legacy a principle of freedom to be applied to all things habeas, from the theoretical – reform proposals and legal debates – to the concrete cases, judgments, and prisoners implicated in our new understanding. Finally, we must consider detention policy as a whole, and the future of the writ, in light of the principles of liberty and the realities of power. There exists legal precedent to fashion a radicalized version of American habeas, but a cultural awareness must first arise.

Appendices included are summaries with analysis of three major World War II Supreme Court cases concerning Japanese Internment and five major cases concerning detention power since 9/11. These illustrate the technical and detailed arguments advanced and how neither side is as clearly right or wrong on its own terms as is often assumed. In most of this analysis, the author reveals which justices’ arguments he finds most compelling. Yet the Great Writ’s history as a weapon of power has rendered most precedential arguments indecisive and most winning arguments to be ones that turn on minor technicalities of law rather than key principles.

The power to issue the writ, the power to suspend its privileges, the power to detain, and the power to release – the centrality of power in habeas jurisprudence helps explain so many otherwise mysterious elements. Its history in England as an instrument to centralize and consolidate authority; its transformation in U.S. history into a centralized, formalistic procedure, despite having a much more decentralized origin than in England; the numerous compromises and betrayals at the hands of those professing to defend habeas corpus and its liberating ideals; the fact that the Great Writ has only sometimes challenged executive detentions; the ineffectiveness of habeas to meaningfully check most criminal convictions – a focus on power sheds new light on all these questions. Those who seek justice for individual victims of state detention must also focus on the ethical principles of liberty and the challenges that state custody itself presents. Keeping our eyes on the power of the writ, we may begin to reassess habeas history.
PART I

A History of Power Struggles
Common Law, Royal Courts

Whereas in almost all countries they use laws and written right, England alone uses within her boundaries unwritten right and custom. In England, indeed, right is derived from what is unwritten, which usage has approved. But it will not be absurd to call the English laws, although they are unwritten, by the name of Laws, for everything has the force of Law.

– Henry of Bracton, ca. 1250

The king’s courts developed habeas corpus to centralize judicial authority and collect revenue. Later, it became a tool to secure an individual’s liberty. Eventually, agitators demanded habeas corpus protections against the Privy Council and the king, often idealizing habeas history in their advocacy. Judicial bodies began using habeas corpus to oversee the king’s high courts, first doing so in a conciliatory manner. It took centuries before the writ was genuinely turned against the king’s oppression.

THE EMERGENCE OF ENGLISH LAW

Modern English legal traditions trace back to the interplay between centralized court systems and customary folk law. In Anglo-Saxon England, the blood feud, a tribal method that the victim’s next of kin employed to extract satisfaction, gradually gave way to the Germanic principle of wergeld. Compensation replaced revenge. King Ine, ruling in the late seventh and early eighth centuries, laid down laws to restrain private vengeance. The accused appeared before court. A defendant failing to come to court three times (gemot) had to pay fines for contempt (oferyrnes). Judgment did not occur in the absence of the accused, so detention became crucial.

Custom and family relations determined jurisdiction. In describing pre-Norman English law, Sir Frederick Pollock wrote:

Jurisdiction began, it seems, with being merely voluntary, derived not from the authority of the state but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honor to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under treaty between sovereign states can compel the rules of those states to fulfill its award.3

Although bishops had their own courts prior to the Norman Conquest, no central court system existed when the Normans arrived in England in 1066. “From this time forward the two coalescing systems in the law were the Anglo-Saxon, largely formed on the Roman tradition, and the Norman, which was almost wholly the product of the Roman model. Not much change was needed in Anglo-Saxon institutions to adapt them to Roman desires.”4

With the Norman Conquest came the beginnings of the king’s law – the “king’s peace.” William the Conqueror introduced Curia Regis (a king’s council), which claimed civil jurisdiction, and the royal missi (itinerant justices). The central courts did not totally displace, but became somewhat superior to, the local traditional court system.5 William separated ecclesiastical and temporal courts, providing an early example of the doctrine of separating church and state, a principle codified in the 1164 Constitutions of Clarendon. In 1166, the Assize of Clarendon normalized jurisdictions, issuing instructions to judges and sheriffs.

As the Catholic Church displaced Germanic folk standards, a somewhat unified order and system of legal thought, custom, and process arose. There existed no monopoly nation-state regulating all legal matters across large swaths of territory, as had become predominant in the modern era. Instead, a plethora of overlapping and competing jurisdictions prevailed, as much horizontal as vertical in their power, tied to various and competing centers of authority.

Within the Church’s canon legal system were both secular and spiritual jurisdictions, each claiming authority over different spheres, but they often overlapped. Both relied on scripture and neither had exclusive dominion over nearly any given subject. Marriage was a religious as well as civil institution. Clerics had to answer to secular law. Such standard crimes as murder and rape had both a civil and spiritual dimension.

Outside the Church’s legal system, other centers of authority developed systems of law to handle matters relevant to their operations. An urban legal code emerged,

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decentralized but informed by the many cities’ experiences. Traders formed merchant law to regulate contracts within and across national boundaries. Feudal and manorial law evolved both to assert the authority of feudal lords and also to protect their subjects against abuse. Of course, the various monarchs also exercised their own power, doing so in ways that both complemented and challenged the authority of other jurisdictions and legal systems. Amid all of this, anyone living within Christendom became subject to two and probably more legal systems, which claimed jurisdiction not only on the basis of territorial control but also on class, vocation, faith, and economic relations.

From the thirteenth through the nineteenth century, royal judges’ rulings developed English common law. Today’s self-described traditionalists in America often condemn judges for “legislating from the bench,” but judge-executed and discovered law was central to the foundation of the Anglo legal system centuries before law was crafted in the legislature.

In 1215, the Barons of Runnymede forced the Magna Carta on King John to outline his proper scope of authority and specifically to shield their property from arbitrary confiscation. The Charter forced the king to submit to a royal council, which eventually formed into Parliament. The principle of just cause for imprisonment had already made an impression in customary law. The Magna Carta codified this principle in its guarantee that no man shall be “taken or imprisoned or dispossessed, or outlawed, or banished . . . except by the legal judgment of his peers or by the law of the land.”

10 As William Duker notes, “many earlier writers have found it necessary to perpetuate the myth that habeas corpus developed primarily to protect the liberty of the subject. In fact, the writ’s evolution can be explained by (to borrow from Adam Smith’s Wealth of Nations) the ‘invisible hand’ of constitutional law – that is, the various departments of English government, by attempting to extend and secure the bounds of their own jurisdiction, enhanced the value of habeas corpus to the subject’s liberty” (Duker, 8).
Because of the intimate relationship that arose between habeas and the prohibition of unjust confinement, a common misunderstanding credits the Magna Carta with guaranteeing or even creating the writ. Although its mechanical origins and underlying principle of just cause predate the Charter, the habeas corpus procedure, as it became known, was rarely, if ever, practiced in the early thirteenth century. On the other hand, in 1215, the need for a remedy to unjust imprisonment was not as apparent as in modern times. The law of arrest was, as Robert Searles Walker writes, “as yet in a primitive state, and the problem of security from arbitrary arrest and imprisonment did not have the proportions which even the complaints embodied in the Great Charter suggested.” The nobility’s fear of the king’s power was an esoteric concern. “Divorced from the power conflicts which raged around the throne, the common man had relatively little to fear.” The detention of subjects before trial “was the exception rather than the rule.”

WRITS, JURISDICTION, AND LIBERATION

Habeas corpus, like other writs, originated as a tool of power. For centuries, popes, kings, and princes used writs to command obedience. The Norman conquerors preferred centralized law, which in practice meant royal courts intervening into the affairs of local courts. Centralization expanded the writ system. From 1066 to 1189, writs other than habeas corpus flourished. For nearly seven centuries, the legal system of writs survived, until legal reforms of the nineteenth century eliminated most of them. In modern times, writs became uncommon in most legal practice, but habeas, among a few others, survived largely because of its unique compatibility with the liberal tradition of thought upholding the dignity of the individual and, ostensibly at least, underlying the justification of government in the Anglo legal tradition.

An increasing uniformity of procedures, including the breve process to make someone appear, consolidated the writ system. In 1166, Henry II’s first major enactment, the Assize of Clarendon, included an early version of the command “have the body.” This order operated to bring accused robbers, murderers, thieves, or receivers before the judge. Many years later, such writs primarily came from Chancery – the king’s equity court system that arose from the Curia Regis and which policed the lower royal courts.

The historically authoritarian nature of writs, contrasted with habeas’s modern libertarian connotations, has for many years guided scholars in their debates over the fundamental nature of habeas’s origins. In 1902, Edward Jenks commented on

12 Duker, 15.
13 “No one called habeas corpus an equitable writ. But this should not keep us from considering the ways in which its use was equitable in everything but name” (Halliday, 87).
the writ’s frustratingly elusive history: “As we follow back the story, we find the same assumption everywhere. The writ is accepted as a primordial fact. A few vague flourishes about ancient liberties are supposed to account for its existence. It would almost seem as though it were indiscreet to inquire too closely into the origin of this sacred instrument.” Referring to the seventeenth-century Parliamentary debates over habeas, Jenks argued that the writ’s embarrassing origins explained the obscurity of early habeas history:

> It is not likely that [Sir Edward] Coke and [John] Selden and [William] Pyrnne were really ignorant on the subject. But they often speak as though they were… In the first place it seems odd (or it would seem odd in any system of law but our own) that the king’s writ, this ‘high prerogative writ,’ as Blackstone calls it, should have been the great engine for defeating the king’s own orders.14

Indeed, the idea of the king’s courts developing a writ to obstruct the king has never lost its irony. Jenks made sense of this by identifying “the most embarrassing discovery” in habeas history:

> [T]he more one studies the ancient writs of Habeas Corpus (for there were many varieties of the article) the more clear grows the conviction, that, whatever may have been its ultimate use, the writ of Habeas Corpus was originally intended not to get people out of prison, but to put them in it.15

Many legal historians object to Jenks’s thesis, but the fact remains that when royal judges used writs to bring forth detainees for conviction and sentencing, they sometimes used the words “habeas corpus” in their orders. Their command that a prisoner be brought forward – that the relevant officials “have the body” – came with the purpose to process their detention, not to set them free. In fact, habeas corpus was sometimes used in this purely procedural manner into the seventeenth century and beyond.16

Jenks argued that the directive’s more common name was capias. Capias ad respondendum – “have the body before the Court” – was a typical trial procedure through the thirteenth century.17 The accused received three warnings: alias, pluries, and capias ultigatum. On appeals in homicide cases, the judge sometimes told the sheriff to “have his body” by a certain date. Even before the twelfth century, judges issued such “habeas corpus” writs to instruct sheriffs to bring forth subjects who defied writs of summons.18 An order to “have the body” appeared in Tyrel’s Case in 1214.19

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15 Jenks, 65. Emphasis in original.
16 Edward Coleman’s treason trial, for example, was initiated in this way (Halliday, 48).
17 Jenks, 67.
18 Duker, 16.
19 Robert Walker, 12.
By the mid-thirteenth century, it became necessary to bring forth parties of a dispute simply to assist in the proper judgment. In 1313, judges used habeas corpus in *Adman’s Case* to inquire into the status of an order yet executed, in *Isabel’s Case* to order a person to answer to an action, and in *Smythe v. the Abbot of Preux* to follow up on a summons. Long before it became a famous independent writ, habeas corpus was a *mesne* process, typically coming after summons, attachment by pledges, and attachment by better pledges, and before *distraint* (whereby property is seized), and extraction or outlawry. By the fourteenth century, judges used such a writ to convene juries, a recently developed institution. Those brought forward this way were sometimes in custody and sometimes not.20

Such legal processes, according to Jenks, “were fully established as ordinary legal process before the end of the fourteenth century.” Such variations of *capias* as “the *Capias ad respondendum*, the *Capias ultigatum* and the *Capias ad satisfaciendum* are practically as old as the common law itself.” *Capias* evolved with the advent of *habeas corpus cum causa*, a command used for two centuries up through the early 1600s for the sheriff or custodian to “have the body of the prisoner” for processing.21

The famous writ of habeas corpus is but one of many writs judges used to order a subject’s presence – it is the writ of *habeas corpus ad subjiciendum* and, more particularly, *habeas corpus ad subjiciendum et recipiendum*. Essentially, this means, “you shall have the body to undergo and receive.”22

The more arcane habeas writs that judges directed against jurors and witnesses shared not only linguistic but procedural similarities with the Great Writ. In use by the early thirteenth century, *habeas corpus ad respondendum* evolved to combine distraining and producing the body. Edward I’s famous Statute of Westminster I streamlined the process and made the sheriff responsible for default. Defendants without any money could not be distrained; therefore, in 1245, in the case *Rad de Planaz v. Dalfr Page*, a defendant refusing to answer a summons became the subject of a sheriff’s orders to “have the body.” Sheriffs were only responsible for making the arrest. Those who posted bail, or sureties, were liable if the subject fled.23 It is this history of *habeas corpus ad respondendum* that Jenks and others cited in identifying the origin of the Great Writ in the enterprise of jailing people, although there exists controversy over whether *capias* truly developed into *respondendum*.24

20 Robert Walker, 14–5.
21 Jenks has found such uses in the Statutes and Year Books of the fifteenth century, and cites Coke’s entries, from 1614, as including an example (Jenks, 69).
22 Halliday writes: “[T]his was the point of *habeas corpus ad subjiciendum*: it would be less concerned with moving bodies – many writs did that – than with inspecting the thinking and actions of those who confined bodies” (Halliday, 16–7).
23 Duker, 17–9.
24 Both *capias* and *respondendum* were used to put people in jail and were steps on the path to modern *habeas corpus*. Yet their differences with one another complicate the narrative that sees the former as developing into the latter. Detention resulting from *respondendum* was “not arrest in a technical sense; it did not order imprisonment, and therefore a return by the sheriff informing the court that he could not produce the seized party in court because he had let the party to pledges was insufficient.” *Capias,*
Other scholars have searched for habeas’s origins not in the linguistic continuity among different writs, but in early legal mechanisms that anticipated habeas’s celebrated function to scrutinize detentions. Even if for self-interested reasons, the royal courts had the motivation to develop a writ of liberty. By the thirteenth century, the king himself had reasons to seek a remedy for extraneous imprisonment. Sometimes, the king exercised his high power to free prisoners, but there arose an institutional need for a more systematic and commonly respected legal process to free people. Judges likely had pecuniary reasons for bringing detainees before their tribunals: deficiencies in bail meant a higher fiscal burden for government.

Methods of scrutinizing detentions included *hominé repligando*, *de odio et atia*, and *mainprize*. Their use traced back to the twelfth century but they all had limits. Chancery issued the *writ de manucaptione* – or *mainprize* – when sheriffs refused to issue lawful bail. But this was limited in felony cases. *Replevin* and the *writ de Odio et atia*, other contemporary writs of liberty, also proved inadequate. Moreover, those detained *per speciale mandatum domini Regis* – under special authority of the

on the other hand, did allow for a return that the defendant had been released to pledges (Duker, 21). These two writs were thus distinct writs, although they interacted. Jenks argues that *respondendum* developed into *capias*, then into *cum causa*, but there is doubt about this history (Mian, *American Habeas Corpus*, 7–8). Furthermore, as mentioned earlier, “habeas corpus” were common words used to summon people for a range of purposes – including defendants, sheriffs, plaintiffs in lawsuits, and even jurors. “In sum, the two-word command ‘habeas corpus,’ which was issued by the various judicial officers of the Crown, was directed to both ministerial officers and private persons, and was relied on in both public and private law. Its objective was a simple one: to compel appearance. It was, indeed, the Crown’s prerogative writ” (Duker, 22–3). Paul Halliday argues that the origin might be found in *habeas corpus ad standum rectum* (Halliday, 49).

25 Duker, 15.

26 Badshah Mian agrees that “the main function of the writ [of habeas corpus] as a guardian of liberty is quite a late development,” but he disagrees that the proper origin of the Great Writ can be determined linguistically by focusing on the legal usages of the term “have the body.” Instead, he has focused on the “other mechanisms to prevent unjust arrest.” Badshah K. Mian, *American Habeas Corpus: Law, History, and Politics* (San Francisco: Cosmos of Humanists Press, 1984), 1.

27 Jenks, 66.

28 Beginning in the first half of the thirteenth century, the *writ de homine repligando* was used to replevy individuals. *Replevin* is a legal process by which a piece of property is reclaimed by its proper owner. In the human version of the process, which crystallized in September of 1227, writs were issued to return serfs to their lords. Eventually, alleged serfs would themselves use the process against sheriffs to claim they were free men. This was thus very similar to *habeas corpus*. *Repligando* could be used when sheriffs, who often abused their power, refused lawful bail, but bail reform in 1275 made this less necessary. Like habeas corpus, *repligando* was thus a way for royal courts to exercise authority over lower officials, and under Edward I it was used to assert jurisdiction (Wyzanski, 101). *Repligando* suffered some setbacks, such as in the fourteenth century when Edward III, as part of his statutory efforts to curb serf mobility during the Black Plague, put limits on it. Furthermore, this remedy was not available to persons detained by the king or chief justice. These limitations, along with reform of bail laws in 1275 that made custodial abuse less likely, led *repligando* to fall out of use (Mian, *English Habeas Corpus* [San Francisco: Cosmos of Humanists Press, 1984], 6; Mian, *American Habeas Corpus*, 3–4).

Under the *writ de Odio et atia*, which, unlike *habeas corpus*, is explicitly affirmed in the Magna Carta, felons and accused murderers could be released on bail on the grounds that the accusation was malicious. This process was long and drawn out, however, requiring twelve sureties – persons willing
The Power of Habeas Corpus in America

king – had no remedy at all. As early as 1234, William Raleigh overruled the king’s
designation of an outlaw, but this was an aberration. Generally speaking, the king
ruled his court system.

Despite these legal mechanisms of liberation, the multitude of different habeas
writs, all commanding obedience to appear before court, complicates all narratives
of early habeas history, regardless of whether historians approach habeas’s origins as
a linguistic problem. Some scholars have reconciled the linguistic and functional
explanations. Robert Searles Walker sees the answer “in the structure of the legal
language itself,” while still disputing Jenks’s theory that habeas was never used to
test detentions for legality until the seventeenth century. Walker cites mentions of
habeas in the Year Books of Edward II for 1213 and examples from the 1350s and 1360s
when the Court of King’s Bench and Chancery used a form of habeas to scrutinize
detentions. 29

While the very unflattering origin depicted by Jenks rests on a contentious lin-
guistic argument, it would be a mistake to assume that judges developed the writ,
even insofar as it worked to release detainees, with the liberty of individuals in mind.
Rather, it was something of a happy coincidence that jurisdictional opportunism
and domineering judges brought about a writ that effectively liberated the wrongly
detained. Although the latter emphasis is what has persisted in Western minds, the
jurisdictional component – the writ’s elemental nature as a tool of power – never
lost its central importance.

Power, more than liberation, was the central impetus behind directing habeas
toward detentions. According to Theodore Plucknett, the early

motive of this policy seems to have been to enlarge the powers of the Courts of
Westminster at the expense of local tribunals, and the result was not infrequently
confusion and injustice. Parties were even allowed to use this process when they
had been committed by judgment of local courts for debt so as to obtain their
release and defraud their creditors. 30

Habeas Corpus Cum Causa

Tumultuous conditions in the fourteenth century prompted the crown to develop
the conciliar court system, a powerful structure that allowed for executive flexibility
but also arbitrary enforcement of the law. Those who favored the common law system
saw the conciliar system and the Chancery as insufficient. The need for a remedy
against unjust executive imprisonment became increasingly apparent. The Act of
1352 affirmed that imprisonment required authorization in an indictment, had to
post bail. It was limited to cases of homicide, however, and only when the accuser’s intentions were
suspect. As appeals of homicide declined, so too did the use of this writ (Jenks, 67).

29 Robert Walker, 8, 13, 18–9.
30 Theodore F.T. Plucknett, A Concise History of the Common Law (Indianapolis: Liberty Fund, [1929]
2010), 57.
occur in the same neighborhood as the detainee, and otherwise must unfold in due manner or from a common law writ. However, “as always in the Medieval period it is far easier to get the law declared than to secure its enforcement and especially so when the act tends to curb the prerogative” of the king and his courts. Parliament continued to complain that the conciliar court system abused its power. Over the next century, arbitrary imprisonments, convictions, and executions became widely documented.\footnote{Robert Walker, 19–20.} As the English populations grew, so too did the number of unbailable offenses. Communities became less intimate as they became denser, and the danger of arbitrary detention rose. From the fourteenth through the seventeenth centuries the royal court system increasingly centralized law.

In the fourteenth century, Chancery created the writ of \textit{habeas corpus cum causa}. Three of the first four uses of habeas emanated from this court and the other from the King’s Bench, which during this century began losing its close relationship to the king and the King’s Counsel, transforming it into “simply a common law court.”\footnote{W.S. Holdsworth, \textit{A History of English Law}, Vol. 1, Third Edition (Boston: Little, Brown, and Company, 1922), 207–12.} Chancery adopted the writ as a regular process, coming after the petition or bill and the allegation of wrongdoing. This writ’s rise accompanied the rise of Chancery’s power as the major English court of equity, which practiced wide discretion over questions of lands, trusts, and other affairs, with much more flexibility than common law courts. The writ caught on partly because it was more versatile and flexible than subpoenas or other orders. Records are unclear as to whether the writ’s first uses allowed for a remedy or just an inquiry, although presumably the former was involved. Over the next century, \textit{cum causa} finally evolved into a fledgling writ of liberty and eventually became the modern and celebrated writ of \textit{habeas corpus ad subjiciendum}. However, behind this “writ of liberty” still lay a motivation of power. It was wielded as “a weapon of the royal courts to subdue the power of inferior and semi-independent jurisdictions.”\footnote{Robert Walker, 10–2.}

\textit{Habeas corpus cum causa} typically complemented one of two other writs: the writ or \textit{certiorari} and the writ of privilege. Certiorari was a prerogative writ the King’s Bench used to move proceedings from a lower tribunal to his own. Upon the request of a prisoner with shown cause, this writ issued “of right” – meaning that it did not issue automatically, but only at the crown’s request. In 1340, the relationship between certiorari and habeas corpus was codified in the \textit{Year Book of Edward III}.\footnote{Duker, 12.} A 1414 statute connected this process with bail.\footnote{Jenks, 69.}

Most likely, Chancery, known to issue writs liberally, began the tradition of issuing writs of \textit{corpus cum causa} accompanied with certiorari to ask lower courts to show cause of detention. Chancery found this a useful power to check inferior tribunals,
and by the 1340s issued writs in response to prisoners’ petitions. It issued *corpus
cum causa* as a response to a number of arrests enforcing the Statute of Staple.\(^{36}\)

A 1353 law designating specific British ports for certain staple imports and exports. In 1389, Chancery demanded that a London inferior court reveal records regarding a controversy between John Reyemes and John Payne against John Botelsham, and issued three writs of *cum causa* to bring force to its review.

Rival courts, which received remuneration in proportion to the number of cases heard, brought *cum causa* into common use in the fourteenth and fifteenth centuries. As early as 1326, common law courts issued writs to sheriffs to challenge detentions. The practice continued and developed throughout the fourteenth century, by which end it sometimes vindicated civil liberties. In 1397, for example, Chancery directed the mayor and alderman of London to bring forth John Walpole, who had been detained for uttering dangerous words.\(^{37}\)

In 1406, the barons of the Exchequer, a common law court, issued a writ to a London sheriff to bring forth a prisoner named John Rede.\(^{38}\) Other courts also began using the two writs to challenge superior courts, sometimes dispensing entirely with the *certiorari* writ, which had traditionally been used to review lower jurisdictions. The Court of Common Pleas took on the practice, eventually using habeas to resist and challenge other royal tribunals, the Chancery, the Court of Requests, the Admiralty, and the High Commission.\(^{39}\) In addition to the common law courts, Parliament also began using the writ.\(^{40}\)

Throughout the fifteenth century, the scope of *habeas corpus cum causa* continued to evolve. Subjects under Henry VI used it as a remedy against private restraint.\(^{41}\) In 1483, Chief Justice Huse threatened to use the writ against the Chancellor. In the 1497 *Year Book* case, a lady used *cum causa* to test the validity of her recapture after her escape from a jailer.\(^{42}\)

The writ at times clarified jurisdictional questions but also revealed “the confusion” inherent in “the complex Medieval court structure.” The writ soon became a mechanism by which royal court judges flexed power over each other internally. The rivalry eventually moved beyond Chancery and the common law courts. The King’s Bench and Common Pleas, starting in the late fifteenth century, used the writ in their “predatory excursion against any other tribunal which took business

\(^{36}\) Jenks, 60.

\(^{37}\) In 1332, the Court of King’s Bench questioned the imprisonment of Peter of Hangelton. In 1343, a petitioner was granted a writ of habeas corpus by the Chancery. In 1389, *habeas corpus cum causa* was used against the London Mayor. By this point, it became policy that a detainee would have to actually be detained to receive the writ (Duker, 24–8).

\(^{38}\) Duker, 29–30.

\(^{39}\) Wyzanski, 101.

\(^{40}\) In 1327, Parliament issued a writ to question the detention of Johem de Glenton by the Abbot de Jude.

\(^{41}\) Duker, 25.

\(^{42}\) Jenks, 73.
from them.” The Admiralty found its expansion of jurisdiction quite lucrative, and the common law courts fought back to challenge Admiralty’s competence.\footnote{Robert Walker, 23–4.}

Fighting over jurisdiction and the benefits of remuneration, courts increasingly relied on \textit{cum causa} to question one another’s competence to hear a given case. Whereas it started as a prerogative royal writ to secure the presence of a prisoner, central courts began using it to audit lower courts and deny them the power to imprison. The use of \textit{cum causa} along with certiorari had its limits and setbacks, however. In 1545, the chancellor declared that only he or the Master of the Rolls – the head clerk, recordkeeper, and judge of Chancery – could issue either writ, and only in open court with the proper signature. Five years later, penalties were established for clerks issuing unauthorized writs. In 1554, legislation created further restrictions. The Court of Exchequer also adopted use of the writ, especially against the Admiralty court. \textit{Pyke’s Case} hemmed in its power in 1553, finding that Admiralty was not subject to the writ. In 1619, the power of clerks to issue writs was reaffirmed.\footnote{Duker, 29–30.}

In Chancery, the power to question the authority of lower courts continued to be significant, and prisoners had a decent chance at review so long as they could effectively challenge the jurisdiction or obtain privilege.\footnote{Robert Walker, 24.} The doctrine of privilege, like the writ of certiorari, often accompanied \textit{cum causa} as a key mechanism of judicial power. Members of Parliament, the King’s ministers, the royal court clerks, and officers enjoyed the right to be tried by their own courts. \textit{Cum causa} helped to enforce this “privilege.”\footnote{Duker, 31.} The writs in conjunction became an effective and widely used method to free people from commitment for debt. The Chancery used it this way so often that a statute in 1414 prohibited release when the return to the writ showed debt as the cause of detention.

In the early fifteenth century, suitors on their way to superior court, stopped and detained by inferior tribunals, used \textit{cum causa} to remove their case and place it in the higher jurisdiction. This happened with Alice Hemynford in 1430 on her way to a lawsuit in the Court of Common Pleas. In 1440, a \textit{cum causa} writ declared the principle that “all legies of the king are under his protection when coming and going to his court of the Bench.”

Privilege could test the very validity of an imprisonment.\footnote{Jenks, 22.} Abuses and limitations, however, became clear. Lower jurisdictions sometimes lost legitimate control over cases.\footnote{Duker, 31–3.} Those detained by the whim of Parliament or the King had no access to privilege. And increasingly, from the fifteenth through the seventeenth centuries, superior tribunals and their claims of privilege conflicted, such as between clergy and Chancery officials.\footnote{Jenks, 71.} Furthermore, \textit{habeas corpus cum causa} continued to favor...
centralizing authority. Chancery expanded its jurisdiction through its use, agitating common law courts that perceived Chancery as stealing their fees.\textsuperscript{50} “[T]he writ of habeas corpus cum causa must be viewed as an expression of the emergent equitable jurisdiction of the Chancellor as well as the centralization of judicial power in the hands of the royal courts.”\textsuperscript{51}

\textit{Habeas Corpus Ad Subjiciendum}

Given the limitations of other writs such as \textit{repligando} and \textit{mainprize}, and the inherent limits of \textit{habeas corpus cum causa} working together with certiorari and privilege, it is not too surprising that a more straightforward remedy arose as a writ to guarantee the liberty of the detained: \textit{habeas corpus ad subjiciendum}. In the early sixteenth century, the redundancy of having multiple writs was eliminated and \textit{habeas corpus cum causa} gave way to \textit{habeas corpus ad subjiciendum}, now a writ independent from certiorari and useful in its own right.\textsuperscript{52} For several centuries, \textit{habeas corpus cum causa} still enjoyed use in parallel to \textit{habeas corpus ad subjiciendum}, but only the latter survived into the modern era.

The writ’s core purpose continued to be jurisdictional muscle flexing. This was the reality from the fourteenth century’s use to correct lower injustices to the challenges against equity and ecclesiastical courts in the fifteenth through the seventeenth centuries. It remained a game of power in Parliament’s romanticized efforts to use habeas to restrain the king.

Through the centuries, the king’s authority suffered a decline in the court of prevailing legal theory. Under the 15th chapter of the Statute of Westminster I, passed in 1275 under King Edward I, those detained by the King were ineligible for the remedy of \textit{replevin}.\textsuperscript{53} By the fifteenth century, the principle had arisen that even the king’s authority could not make an unjust detention legitimate. A judge under Henry VI declared, “If the king command me to arrest a man, and I arrest him, he shall have an action of false imprisonment against me, though it were done in the king’s presence.”\textsuperscript{54}

At first the common law courts showed reluctance to challenge the authority of detentions conducted by the King’s Privy Council. Eventually this reluctance gave way to a conciliatory use of the writ to examine the Privy Council detentions, only to turn against the body and eventually check the king himself.

The late sixteenth century was a dynamic time for England, with the rise of the merchant class, the Reformation, and the Shakespearean renaissance. These transformations in art, literature, economics, and religion accompanied major political

\textsuperscript{50} Duker, 33.
\textsuperscript{51} Robert Walker, 25.
\textsuperscript{52} Mian, \textit{American Habeas Corpus}, 16.
\textsuperscript{53} Jenks, 65.
\textsuperscript{54} Cited in Church, 6.
shifts. The medieval commonwealth had crumbled. Religious conflict, in particular, sowed the seeds for a revolution in law as well.

The Puritans, in seeking protection of their rights against the Anglican Church, found their legal weapon in the form of the common law, Magna Carta, and habeas corpus. What began as a largely rhetorical and polemical tool in fighting for their freedoms eventually brought about changes in the actual law. The Great Charter, virtually neglected throughout the fifteenth and sixteenth centuries, became a popular rallying cry. Meanwhile, the Queen and her Council ratcheted up executive detention. Elizabeth’s rule signaled the beginning of an embryonic English nationalism and an end to the old feudal order.

Because of religious conflict, the Puritans’ theological differences became political grievances. They invoked the Charter in their struggles with the High Commission, the Privy Council’s enforcement arm used to implement the Acts of Uniformity and Supremacy, which compelled all officeholders to swear allegiance to the Crown as the head of the English church. Separate from the ecclesiastical courts, the High Commission by the 1580s was a distinct court with both original and appellate jurisdiction, and which Henry VIII had given ecclesiastical jurisdiction. Common law advocates regarded it a usurpation and abuse of power. Resentment toward the High Commission grew over the next decades, as Parliamentarians and common law supporters became increasingly bold in their opposition to its power and private proceedings; its lack of open hearings, notifications of cause, or formal allowance of an appeals process. In *Hinde’s Case* (1577), Common Pleas effectively released a man imprisoned for usury, finding that the High Commission had the authority to try, but not to imprison for this offense.

The restoration of *ex officio* oaths, forcing the accused to declare his innocence in an ecclesiastical context, brought the tension between the royal system and religious dissidents to the forefront. In *Cartright’s Case*, the subject was forced to face the Star Chamber for his refusal to take the oath before the High Commission. Despite all this, the common law courts still did not confront the High Commission’s authority head on. The same year as *Cartright*, the common law courts addressed the High Commission in a seemingly deferential matter in *Caudrey’s Case*, maintaining “a façade of cordial relations with the ecclesiastical structure.”55 Such challenges probed the High Commission’s findings on its own terms, whereas never directly questioning its authority.56

Common law courts eventually began exercising power with a new confidence and esteem for the common law, an interest in which the Puritans had rejuvenated, but for which they could not effectively fight alone. The common law courts, emboldened by their challenges to Chancery – which was largely immune because it could issue habeas corpus for its own benefit – Admiralty, and, in a limited scope,

55 Robert Walker, 33.
56 Robert Walker, 27–34.
the High Commission, eventually took on the Court of Requests, an equity tribunal with Privy Council attributes, to challenge its detention power. Meanwhile, agitators in Parliament began working on a codified protection of habeas corpus.

The Privy Council was unconcerned with the King’s Bench’s use of the writ against other jurisdictions, for “the authority of court and Council flowed from the same fount: the [king’s] prerogative.” The first time the common law courts took on the Privy Council demonstrated no genuine challenge to its authority. Anthony Brown, appointed by Queen Mary to the office of Chief Justice of Common Pleas, refused to recognize the appointment of Coleshil as Exigenter of London – at the time an important office within the Court of King’s Bench and Common Pleas – claiming it was his job to fill the slot with his own appointee, Skrogges. Elizabeth then ascended to the throne and handed the question to Sir Francis Bacon, who convened all the high judges except those from Common Pleas. The judges agreed it was Skrogges’s decision. Elizabeth responded by forming a new commission and declaring that if Skrogges did not appear, he should be arrested and Coleshil should be appointed. Coleshil charged Skrogges with “deforcing” him – depriving him of his rightful office – and Skrogges responded by denying the commission’s jurisdiction over the matter. Under Elizabeth’s order, Skrogges was imprisoned, but then released on a writ of habeas corpus issued by Common Pleas and combined with the privilege of the Common Bench.

According to common narratives, Skrogges v. Coleshil (1560) foreshadowed later cases of the common law courts questioning the Privy Council’s detention authority. But Robert Searles Walker has doubts about this interpretation. Looking at Skrogges as well as Binck’s Case (1544), he finds the evidence ambiguous, arguing that Binck’s Case “may have been merely turned over the King’s Bench for disposal” as a procedural matter and “that the common law courts were performing an investigatory or judicial task for the Privy Council.” The frequent necessity at the time to inquire into false identity also bolsters Walker’s case that the writ was being used procedurally in assistance to the Privy Council, not as a substantive check on it.

As late as 1577, the Court of Common Pleas conceded that returns from Council did not have to contain much detail. The tide began to shift against the Privy Council’s unquestioned authority. By the time of Hellyard’s Case in 1587, Common Pleas asserted that it would reject insufficient returns from the Privy Council. The court soon granted relief to William Peter, held by the Privy Council, and in Howel’s Case it upheld the Council’s detention while reaffirming the right to order that the body be brought forward.

In 1588, Common Pleas directly challenged the Crown’s privilege. A petitioner named Search had been arrested by the Steward of Marshalsey for having arrested

57 Halliday, 26.
59 Duker, 40–1.
Mabbe, who had Letters of Protection from the Queen. The Court of Common Pleas released Search.\(^{60}\)

In 1591, the King’s Bench, the Court of Common Pleas, and the Exchequer Court complained that the Privy Council unlawfully rearrested people after habeas corpus proceedings and sent them to secret prisons.\(^ {61}\) At the height of the Elizabethan era, common law courts now asserted their habeas authority to resist jurisdictional usurpation by the Chancery, the Court of Requests, the Admiralty, and the High Commission.\(^ {62}\) In 1592, the famed Anderson Report established the independent writ of habeas.\(^ {63}\) The same year, the *Resolution of the Judges* indicated that the Privy Council did not oppose habeas corpus outright, just its recent usage to directly challenge its authority, such as in *Search’s Case*.\(^ {64}\)

Nonetheless, executive commitments still remained mostly beyond the effective reach of the writ. When the return to a writ showed a detainee was being held under direct command of the Crown, the detention was generally upheld. The common law courts engaged in the balancing act of asserting their rights to question detentions while still acknowledging the executive’s detention power. “[E]ven while admitting to their powerlessness in the face of executive commitments, the judges doggedly insisted on their right to issue the writ in any case of commitment.”\(^ {65}\)

Efforts began to expressly define habeas corpus procedure in terms of individual rights. In 1593, Puritans in Parliament, led by James Morice, backed a statute to officially link habeas corpus with the settled principles of the Magna Carta, but their effort failed when Sir Edward Coke shelved the bill.\(^ {66}\) All the while, advocates of a more rigorously protected habeas corpus writ dubiously claimed the mantle of established precedent.

Habeas continued to protect higher judicial officials against lower ones. By 1570, every officer on the Common Bench, Exchequer, King’s Bench, and Chancery enjoyed privilege against inferior court processes. In 1599, the King’s Bench denied the power of London to have jurisdiction on the issue of slander.\(^ {67}\) Meanwhile, although lower courts asserted their power over higher courts, various reforms limited the writ’s effectiveness in this capacity. A reform by Queen Elizabeth stopped people from benefiting from the privilege of habeas once jurors were sworn in.

In 1623, the lower courts were given rights to ignore higher courts. Moreover, the central courts no longer sought as much caseload now that their premier status was established.\(^ {68}\) But the writ continued to develop as a way for courts to check each

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\(^{60}\) Jenks, 72; Duker, 42.

\(^{61}\) Duker, 42.

\(^{62}\) Wyzanski, 101.

\(^{63}\) Jenks, 74.

\(^{64}\) Robert Walker, 40.

\(^{65}\) Robert Walker, 41.

\(^{66}\) Jenks, 18.

\(^{67}\) Robert Walker, 42.

\(^{68}\) Duker, 31.
other and release prisoners. In the early seventeenth century, the Court of Common Pleas released prisoners, such as in 1608 when it freed the High Commission prisoner Sir Antony Rooper.\textsuperscript{69}

Soon the political atmosphere surrounding habeas corpus shifted the writ toward Parliamentary protection, and finally solidified \textit{habeas corpus ad subjiciendum} as completely distinct from \textit{cum causa}.\textsuperscript{70} The Puritans’ opposition to the powers of the courts, especially the ecclesiastical courts, coupled with a practical support for the common law among a growing number of the Privy Council critics, culminated in the next century of struggle to codify the Great Writ’s protections.

The early seventeenth century, the era of the early Stuart Kings, featured prime conditions for legal development. The threat from Spain and the resistance in Ireland had receded, and the kingdoms of England and Scotland were united under one crown. This tranquility allowed for more effective focus on legal reform. With the return of Catholic influence, religious tensions raised the stakes of legal debate. King James’s pretenses of power over Parliament alienated much of the public.\textsuperscript{71}

The relative calm marking the beginning of this period and a kingdom wary of its monarch coincided with an accelerated pace of habeas development. The role of habeas issuing to the High Commission changed in character, from cooperation to antagonism. At the Hampton Court Conference of 1604, King James and delegates from the Church of England temporarily sustained the political status quo through conciliatory compromise. Soon enough, James happily oversaw rigorous use of the \textit{ex officio} oath, especially out of hostility toward Presbyterians. The same year 300 clergymen were deprived of their offices for not giving the oath. This aggressiveness prompted the Puritans to react boldly.

Common law courts increasingly challenged the High Commission as well as the ecclesiastical courts. In what became an all-out assault, they ruled that the Commission could not jail people for alimony, try normal felonies, or exercise power over people with privilege in common law courts. Puritans continued to agitate for codified recognition of habeas corpus and Magna Carta in Parliament. \textit{Nicholas Fuller’s Case} represented a last gasp of the old order. An attorney of clients jailed for violating their oath before the High Commission, Fuller petitioned the King’s Bench for the writ. He himself ended up arraigned before the Commission on grounds of slander. The King’s Bench issued him a writ of habeas corpus, bringing James into the fray. The issue became clearer: the King’s Bench conceded that the High Commission had jurisdiction over the case; it disputed that the King could empower the High Commission to fine and commit for cases that did not involve heresy. Under the king’s prerogative, Fuller was remanded to the High Commission’s custody.\textsuperscript{72}

\textsuperscript{69} Jenks, 74.
\textsuperscript{70} Robert Walker, 42.
\textsuperscript{71} Robert Walker, 47–9.
\textsuperscript{72} Robert Walker, 50–3.
Habeas increasingly frustrated Chancery. In *Glanville’s Case*, the King’s Bench issued multiple writs to Glanville, whom Chancery had detained for carrying out the King’s Bench’s orders. The King’s Bench argued that only Parliament could overturn its orders, citing precedents going back to 1567 — but those precedents rested on shaky ground and an idealistic reading of legal history. In truth, Chancery probably had the law on its side. Nevertheless, an idealistic, even populist interpretation of the role of habeas corpus gained ground. In 1608, a comedy featured the line: “Dirlady so it is not mine, ide/ give my goods for a good habeas corpus,/ to remove me into another country.”

Even as habeas corpus transformed into a weapon against royal prerogative, it was still mostly a jurisdictional concern, and much of the battle for habeas still transpired in the king’s own courts. However, liberty for the prisoner was not the prime motivation. The tendency of the common law courts to express their power not just toward authorities above but those below was seen in such cases as *The Case of the Marshalsea* in 1613, when the King’s Bench overturned a court of the Steward and Marshal on grounds of Magna Carta and due process principles, and in *Richard Bourne’s Case* (1612), in which special and local courts were found to have no exemption from the oversight authority of the central courts.

This use of habeas corpus as an instrument of political centralization prevailed for the writ’s first several centuries. The writ arose in the royal court system and, for the most part, had very little effect in checking executive detention power. Those who harkened back to an alleged tradition of common law that featured habeas as a meaningful due process right for the individual were on historically weak footing. Even in celebrated cases, the writ was more often used in cooperation with the Privy Council than against it.

After the King’s Bench became the dominant player in habeas corpus proceedings, it began taking from the Privy Council its role as final arbiter over other courts. But the Privy Council was still, largely, above the law. Most of the cases in the early seventeenth century showcased a deferential treatment toward its authority, even as the common law courts began asserting more power for themselves. The Council was the Crown’s principal arm of executing its decrees. Jailing people without indictment was a core feature of its very structure. In 1627, this finally became a matter of major controversy, one involving fundamental legal principles.

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Parliament and the King

Twas a great misfortune to the people as well as to the crown, the passing of the habeas corpus act; since it obliged the crown to keep a greater force on foot than it needed otherwise to preserve the government, and encouraged the disaffected, turbulent, and unjust spirits to contrive and carry with more security to themselves their wicked designs.

– James II

When habeas corpus finally turned against the king, it did so in a limited fashion and through a process that had as much to do with power as with liberty. Parliament had less interest in freedom than in securing institutional immunity against royalty and in aggrandizing its own authority. Many of its own detentions enjoyed exemptions from habeas protection. In the centuries of its famous struggle to restrain the king, Parliament conducted far more arbitrary arrests than the infamous Privy Council. It eventually codified habeas guarantees against the king but even then left open significant loopholes for executive detention. What is more, upon overthrowing the king’s authority and monopolizing political power, Parliament revealed itself as a menace to liberty rivaling the king’s oppression, more than once opportunistically dispensing with habeas protections that obstructed its agenda.

Charles I began his reign in the midst of religious conflict and ended it amidst a civil war that lost him his head. By alienating the Puritans, marrying a Catholic, antagonizing Parliament, and embarrassing “the nation with a foreign policy composed of a long series of expensive and humiliating fiascos,” Charles I managed to squander the good feelings that had characterized early Stuart rule.

His unpopularity emboldened the legal struggle against Charles’s prerogative. The House of Commons impeached numerous of his officers and at times refused to grant him supplies. Affirmations of the common law against his arbitrary authority appeared in the Parliamentary Diary, such as, “The king cannot deteine any one in

1 Church, 30.
2 Robert Walker, 47–9.
prison above twenty-four hours without showing the cause of his imprisonment if it be demanded [according to] Magna Carta.” This “was a very inaccurate statement of the existing law,” writes Robert Walker, which “was not half so important as the fact that it was stated.” Indeed, habeas in practice lacked teeth. In 1621, a bill to enshrine habeas by statute had failed. Although it exempted commitments for treason or those ordered by at least six members of the Privy Council “for reasons of state,” the harsh penalties for violating this legislation still made it politically untenable.4

FIVE KNIGHTS AND STAR CHAMBERS

Because the king could not force people to relinquish supplies without Parliamentary cooperation, Charles embarked upon a policy of forced lending. Resistance to the Forced Loan was widespread and enforcement harsh. Violators were often pressed into military service or committed by the Privy Council. Under this authority, without common law or statute legitimizing it, the Crown imprisoned hundreds of resisters.5

In 1627, the Privy Council issued a warrant to imprison Sir Thomas Darnell and four other knights for refusing to acquiesce to Charles’s forced loan. They petitioned for habeas corpus and received it. The warden responded that they had been detained per speciale mandatum Domine Regis – “by special command of his majesty.”

The Five Knights argued:

The Writ of Habeas Corpus is the only means the subject hath to obtain his liberty, and the end of this Writ is to return the cause of the imprisonment, that it may be examined in this court, whether the parties ought to be discharged or not: but that cannot be done upon this return: for the cause of the imprisonment of this gentleman at first is so far from appearing particularly by it, that there is no cause at all expressed in it.6

The lack of legal remedy bothered the King’s Bench. Serjeant Bramson pleaded:

I beseech your Lordship...if this return be good, then his imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberty perpetually, and by law there can be no remedy...and therefore this return cannot stand with the laws of the realm or that of Magna Carta.

The attorney general, on the other hand, argued that whereas the “liberty of the subject is just, and that it is the inheritance of the subject...[T]he king is the head of the same fountain of justice.”7

3 Robert Walker, 59.
4 Robert Walker, 65.
5 Robert Walker, 59.
6 Duker, 44.
7 Robert Walker, 60–3.
The case crystallized the habeas controversy, weighing the king’s prerogative directly against the liberty of the individual. Holding that the King’s Bench could not bail the subject, Lord Chief Justice Hyde ruled in favor of the king’s prerogative. This ruling was entirely consistent with precedent. Indeed, the Five Knights’ attorneys were probably wrong about a number of details in their arguments. The case’s resolution demonstrated habeas’s core jurisdictional nature.\(^8\) The next decade saw diminished habeas use, but in the long term it foreshadowed a broader use of *habeas corpus ad subjiciendum* to question the nature of arrests and not just detentions.\(^9\)

The king had dissolved Parliament before *Darnel’s Case*, but soon afterward he ordered it to convene to consider financial matters. In 1628, immediately upon assembling, Parliament instead focused on habeas corpus. The House of Commons passed resolutions that no one should be imprisoned without a showing of cause, that habeas corpus was always available, and that a writ returned without cause should result in the freeing of the prisoner, even one held by the king or Privy Council. John Seldon and others argued in Parliament that habeas must effectively restore unjustly imprisoned men to liberty, which had been denied in *Darnel’s Case*. The idea formed that habeas should test detentions and trigger a trial in the presence of just cause, guarantee access to bail in the case of minor offenses, and free subjects if innocent. The House of Lords wanted a much less radical resolution affirming Magna Carta in the abstract while allowing executive detentions “for reasons of state” to remain unchecked. The prospect enraged members of the House of Commons. Edward Coke warned succinctly: “Reason of state lames Magna Carta.” The two sides could not reconcile. The radicals wanted arrest warrants to include a royal admission that the executive detention fell outside the common law. The conservatives wanted a milder resolution. But both wanted a statement that ultimately undermined the precedents of the *Resolution of the Judges* and *Darnel’s Case*, and the entire experience of law up to that point.

In 1628, Parliament approved the Petition of Right, a resolution against taxation without Parliamentary consent, forced loans, violations of property rights, martial law, and loopholes in due process. The most significant statement condemned arbitrary arrest, unjust imprisonment, and violations of habeas corpus. The king begrudgingly ascended to this resolution, but it had virtually no legal force.

Nevertheless, habeas corpus and executive detention had become public issues, and the limitations of habeas as an effective tool against royal absolutism were now widely apparent. No longer could the informal nature of returns from the royal councils satisfy, simply replying that the detainees were being jailed under the command of the king. A new awareness arose of the trickery involved in circumventing and delaying the habeas remedy – by letting the process transpire for a year or more, by transferring the detainee from one prison to another, or by recommitting those who

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8 Halliday, 137–40.

9 Before the *Five Knights Case*, arrests were questioned through *habeas corpus ad faciendum* (Halliday, 50–3).
had been freed. The middle-of-the-road position adhered to by the common law courts for so many years – that royal detentions could be questioned but not remedied – was no longer tenable. For the first time, the discourse over habeas corpus became fundamentally inextricable from the principle that a writ must effectively remedy unjust detentions.\(^{10}\)

Meanwhile, the Court of Common Pleas was checking Admiralty, and the Court of Request and common law courts effectively obstructed lower councils in Wales and York. In 1629, Charles I attempted to protect these councils. Although he had shelved the bill connecting habeas to Magna Carta, Coke defended the high activity of habeas corpus, arguing it was a logical result of increased council activity. Indeed, as Chief Justice of King’s Bench, Coke was among the most significant in transforming the writ into an active tool to regulate other jurisdictions, although release rates declined while he was in office.\(^{11}\)

Following *Darnel’s Case* and the Petition of Right, the House of Commons investigated violations of the intent laid out in Parliament’s resolution. Returns and warrants from the Privy Council became a little bit more elaborate, but in essence still invoked the power of arbitrary decree. They would cite “notable contempts” or “insolent behavior” before the Council as the reason for detention. In 1637, Justice Crooke denied the force of the Petition of Right in the *Ship Money Case*. But by 1639, the common law courts were back on the offensive, saying that “contempt” was not a sufficient cause on a return. In 1640, King’s Bench bailed a man committed by Privy Council for insufficient return, even though the return was in fact quite detailed. The same year, King’s Bench bailed another man in *Wilnough’s Case* who had been detained under the Council’s authority.

In 1640, Parliament convened, unhappy about the Privy Council and especially the Star Chamber, a notorious tribunal used by the Crown to circumvent judicial scrutiny of its detentions. The Habeas Corpus Act of 1641 abolished Star Chambers, fulfilling the principles in the Petition of Right with greater force than before. It stripped Privy Council of its jurisdiction over civil matters and abolished the regional council courts. It declared that anyone detained by the king or Council had immediate access to the remedy of habeas corpus at the demand of the judges of the King’s Bench or Common Pleas. It even established penalties for recalcitrant custodians and judges who refused to issue the writ.\(^{12}\) The High Commission was abolished. This Act stands with the distinction as the first statute to mention habeas corpus by name. Symbolically, at least, it constituted a huge triumph, but in practice it still did not completely prevent the king from transporting people to secret prisons beyond the seas. Within months of the abolition of the Star Chamber, the House of Commons resumed its protests about arbitrary executive detentions.

\(^{10}\) As Robert Walker writes, the “Petition of Right marked the end of the normative development of the writ of habeas corpus” (Robert Walker, 71–3).

\(^{11}\) Halliday, 22, 30.

\(^{12}\) Duker, 47.
The dramatic struggle between Charles and Parliament defined the 1640s. In 1642, Charles’s use of four hundred soldiers in an attempt to arrest five members of the House of Commons for treason sparked the First English Civil War between his supporters and those of Parliament. The conflict ended with the king’s imprisonment in 1646. From prison, Charles encouraged the Second English Civil War, an act Parliament regarded as an unforgivable betrayal of the country.

In 1648, the Commons committed John Lilburne to the Tower on the charge that he had published treasonous and seditious material. Lilburne was a strong pro-Parliament voice during the Civil War, but then came to believe that tyranny of Parliament rivaled or surpassed that of the Crown. He had to petition three times to gain his freedom. The threat of arbitrary executive detention had now given way to the threat of arbitrary Parliamentary detention.

The House of Commons created the High Court of Justice to try Charles for treason. In January 1649, this tribunal of commissioners reminiscent of the Star Chambers sentenced the king to death. Parliamentarian opponents of the king’s own Star Chambers defended the tyrannicide on the grounds that “the people [as in, Parliament] are, under God, the origin of all just power.” Whereas the king’s partisans had defended his power to execute the law without restraint on the basis that he was the law, Parliament’s defenders now said the same about Parliament. This turnabout highlighted the selective nature by which even the advocates of habeas corpus applied their principles. It was the first of many betrayals of these principles by those thought to champion them.

The same year, Parliament suspended habeas corpus and certiorari for those accused of violating price controls, which Parliament had imposed to manage the distribution of goods in the English Civil War. The same body that had championed habeas against the king turned on the principle immediately upon assuming control, all to enforce an economic regulation of dubious value that was only “necessary” because of the chaos caused by political institutions.

During the period of Parliamentary rule, habeas most likely issued fairly regularly in normal cases. Other issues dominated the political scene, such as debt relief, taxes, and the gratuitous corruption of Chancery that nearly resulted in its dissolution. In 1649, a reform extended habeas corpus to debtors, who could be released from prison if they gave up most of their belongings in something akin to a “voluntary action in bankruptcy.”

But the Parliamentarians’ hypocrisy toward the Great Writ became very clear, particularly in the actions of Oliver Cromwell, Lord Protector of England, Scotland, and Ireland, who imprisoned John Streater in 1653 for disseminating “seditious Pamphlets against the State.” Attorney General Prideaux claimed Parliamentary

13 Duker, 48.
14 Robert Walker, 77.
privilege to detain Streater, and a court considered this insufficient but did not question the detention. When Cony, a London merchant, made a Cromwellian argument against his punishment for not paying customs duties he considered illegitimate, Cromwell reprimanded the judges and kept him in jail. When Cony’s barristers attempted to prosecute a suit against the collector, Cromwell jailed them too. The Lord Protector bullied others out of suing tax collectors, and his dictates brought Chief Justice Rolle to resign in frustration.\(^\text{15}\)

In short, a series of grave abuses of habeas corpus quickly followed the first Habeas Corpus Act abolishing the Star Chamber. In particular, although the 1640 Act stripped away the royal prerogative to imprison without cause, new authorities now conducted these injustices. When Parliament tried to stop Richard, Cromwell’s son who inherited the role of Lord Protector, from circumventing the spirit of habeas by sending prisoners to remote lands, he dissolved the legislative body.\(^\text{16}\)

By the end of the Protectorate’s rule and for the first years of the Restoration, the practice of habeas corpus, at least regarding normal commitments, was not always clear or satisfactory. Chancery could issue the writ for any cause and at any time. King’s Bench could issue the writ for any cause, but when it was vacated this authority was challenged. Exchequer could only issue the writ with privilege and in non-criminal cases. Common Pleas could issue the writ, but its boundaries were somewhat ambiguous, and its power would be questioned after the Restoration.

Soon after Charles II assumed the throne and restored the monarchy, Parliament passed the Statute of Treasons of 1661, empowering the executive with great leeway in pursuing sedition and political crimes. These detentions required a low standard of evidence and offenders were easy to arrest. Warrants allowed the detention of prisoners until further notice, causing significant delays. Prisoners were soaked for fees and left in prison without trial. In the 1660s, judges had wide discretion on when to issue writs. Each writ needed a new motion and there was no way to follow up on petitions. Prisoners had to incur the costs of the writ.\(^\text{17}\) Most political prisoners granted habeas relief languished in jail for at least a year before bail, although very typically about two years.\(^\text{18}\)

In November 1667, Parliament unsuccessfully impeached the Earl of Clarendon for having sent people to “remote islands’ garrisons and other places, thereby to prevent them from the benefit of the law.”\(^\text{19}\) Clarendon was a vocal critic of Charles I and helped to abolish the Star Chamber in 1641. Becoming concerned about Parliament’s overreach, he became Charles’s adviser at the beginning of the English Civil War. Ennobled during the Restoration, Clarendon became targeted by the

\(^{15}\) Duker, 48–51.

\(^{16}\) Duker, 62.


\(^{18}\) Nutting, 530, note 8.

\(^{19}\) Nutting, 531–7.
House of Commons, which insisted upon his imprisonment. The Lords, channeling Coke and Lilburne, objected to the vague charges, declaring it “contrary to natural justice and reason that a person accused should be punished before he knows his crime.” A member of the Commons responded: “Parliaments are confined to no rules or precedents.”

In 1670, William Penn and William Meade were arrested for publicly preaching in protest against laws restricting assembly. Jurors found them guilty of speaking on Grace-Church Street, failing to convict them of the violations of the Quaker Act as demanded by the prosecution. The jury itself was then imprisoned, told to return the correct verdict if they wanted their freedom, fined, and deprived of meat and tobacco. One juror, Edward Bushel, refused the fine and petitioned for habeas corpus. This conflict culminated in Bushel’s Case, one of the most celebrated in history. Chief Justice Vaughan of the Court of Common Pleas declared that “the Writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against the law deprived of it.”

Officials became increasingly concerned with habeas’s practical problems and legal ambiguities, although these logistical issues did carry implications for individual liberty. From 1669 to 1677, several attempts to remedy the practical problems appeared but failed to pass in the House of Lords. One of the most discussed limitations with habeas concerned the question of vacation – whether a detainee could get relief when the judge was not on duty – and privilege. Writs flowed readily during a judge’s vacation even before Coke’s Institutes in 1640 affirmed the practice. However, this soon became a matter of controversy. For example, the House of Peers ordered Earl of Shaftesbury imprisoned in a tower for an unspecified, general charge. Although the return was inadequate, the Court of the King’s Bench remanded him. “The writ,” writes William Duker, “was thus unable to overcome an illegal commitment insulated by the concept of privilege, the same concept that in earlier times had been a catalyst in the transformation of the king’s ‘prerogative writ’ into a writ of liberty.”

In 1675, the king and House of Lords found a reason to favor a stronger role for habeas. The House of Commons ordered the detention of counsels from the House of Lords, which decried the act as a violation of the Magna Carta and the Petition of Right. It tried issuing a writ of habeas corpus and the Commons responded by resolving that the writ did not apply. The king terminated the Parliamentary session.

The quintessential case of Francis Jenks summed up the abuses endured by prisoners because of the problems of vacation. In June 1676, he was imprisoned for

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20 Halliday, 231–3.
22 Mian, English Habeas Corpus, 37.
23 Halliday, 259.
24 Duker, 58–9.
sedition for a speech he gave calling for Parliament to reconvene. He tried to get bail any way he could, short of apologizing to the Council. The case illustrated that the habeas theories held by the King’s Bench and Chancery, which had developed somewhat organically, were irreconcilable. Lord Chief Justice Ransford refused habeas relief on the grounds that the court was out of session, insisting that Coke had been wrong about habeas access during vacation.

A debate raged over Jenks that touched upon fundamental questions about the writ’s relationship to certiorari and privilege, which courts had authority, and why they could only issue the writ during session. In 1679, Parliament tackled these practical concerns.

THE HABEAS CORPUS ACT OF 1679

This celebrated legislation has enjoyed its share of mythology. Much of the mystique attempts to explain the presumably inexplicable passage of such an allegedly revolutionary act and Charles II’s assent to it. Gilbert Burnet famously said that in tallying the votes, one fat man counted as ten. Many have mused that it was probably passed illegally, although others have pointed out that King James II had the power to overturn the act in 1685 in the event of a truly inaccurate count and did not do so. The documentation available is tragically scarce. The debates were not well transcribed, political pamphlets do not address the full debate, and legal reporting was loose. Historians have relied on studying the writs themselves, the court daybook, the petitions to the Privy Council, and a few scattered documents. “The nature of the material available itself supports the argument that this important legislation made a relatively slight impression on the minds of contemporaries,” one scholar remarked. Whereas it has since become widely celebrated in the history on Western law, many onlookers at the time saw the Act as a way to deal with recalcitrant jailers and clean up the technical problems with the writ’s enforcement.

What is known is that the famous Habeas Corpus Act of 1679 passed amid political turmoil, and it coincided with other reforms in the 1670s. The habeas agitators saw the Privy Council and Restoration government itself as their targets. There were new Parliamentary elections. Regulation of the printing press had just expired and the people enjoyed a new freedom of the press. Commoners and advocates of the act became willing to compromise, recognizing the limits in their authority over the king’s prerogative, and began emphasizing the regulation and control of the process rather than the principled prohibition of unjust imprisonment. Meanwhile, the House of Lords also wanted to protect its own members from arrest by the House of Commons. When the House of Lords put forth amendments placing certain limits on the Act, removing its application to civil cases and giving a time limit

25 Duker, 57; Nutting, 1; Mian, American Habeas Corpus, 22.
26 Jenks, 77.
27 Nutting, 527, note 1.
to prisoners applying for habeas corpus during vacation, the House of Commons accepted the amendments immediately.\textsuperscript{28} The wide popularity of the Act along with other political concerns compelled King Charles II to assent to the new law.\textsuperscript{29}

The Act addressed a number of timely concerns – denial of the copy of commitment, neglect by custodians in providing return, questions as to who had authority to grant the writ, guarantees that the writ would issue without much delay, the reach of the writ to territories outside of England, and the exception of treason and felonies from the offenses to which the writ applied. The Act mandated the immediate issue and return within three days of the writ, ending the practice of \textit{alias} and \textit{pluries}, and empowered all judges of the superior courts with competence to issue the writ. Prisoners could sue for habeas in the courts of Chancery, Exchequer, King’s Bench, and Common Pleas; while the courts were vacated, the Lord Chancellor or a judge from the latter three courts could issue the writ. Undue delay of trial after bail would result in discharge. Judges who refused to grant the writ would have to pay 500 pounds to the prisoner. Bail or indictment would quickly follow the arrest of someone accused of high treason, such as plotting to kill the king. The legislation spelled out the process of record transfer and certification.

The Act addressed the problem of officials sending detainees to remote areas beyond the writ’s reach. Whereas the law allowed for extradition, immigration to the colonies, and the transportation of convicted felons, it generally guaranteed that no subject inhabiting the Kingdom of England, dominion of Wales, or the town of Berwick-upon-Tweed, “shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into other parts, garrisons, islands, or places beyond the seas, which are of any time hereafter shall be within or without the dominions of his majesty, his heirs or successors.” The law guaranteed to people so detained a claim of false imprisonment and the privilege of habeas corpus.

However, the Act retained many limitations to the writ’s reach. It did not apply to civil cases, although many had hoped it would. It maintained an exception for indentured servants and capital offenders in Scotland and Ireland, and lawful felon convicts could still find themselves sent abroad. Accessories before the fact to offenses of petty treason or felony could still be held on mere suspicion. Contempt of Parliament would count as a conviction and habeas would not apply, nor would it apply in unbailable offenses.\textsuperscript{30} Moreover, returns to the writ did not have to be truthful; procedural correctness rather than veracity rendered a return sufficient.\textsuperscript{31}

No remedy existed for false returns. Delays still occurred. Excessive bail remained legal until its prohibition in the 1688 Bill of Rights. Moreover, the Habeas Corpus Act denied relief to those detained by the Privy Council or secretary of state for

\textsuperscript{28} Nutting, 534–6, 541.
\textsuperscript{29} Church, 21.
\textsuperscript{30} Church, 25, 48–51.
\textsuperscript{31} Mian, \textit{English Habeas Corpus}, 48.
high treason.\textsuperscript{32} Although the Act established severe penalties of £500 for judges who refused to issue writs, there is no evidence any judge was ever so charged.\textsuperscript{33}

The Act did not work right away. A man named Pepys had been committed to the tower shortly before the Act passed for the treasonable offense of being a Roman Catholic allied with the Pope. After the Act’s passage, he brought his case to the King’s Bench and applied for bail. The court denied his request. He demanded a trial, as was his right under the act. He was remanded to the tower. The court granted an excessive bail of 30,000 pounds and he gained relief, a year after his commitment, only when the sole witness in his case changed his story.\textsuperscript{34}

A few cases underscored the extent to which liberty had yet to prevail. In December 1689, the House of Commons committed Sheridan and Day, who were denied habeas relief.\textsuperscript{35} Algernon Sidney, whose plotting against Charles II resulted in him being executed for treason, was sent to the tower on May 26, 1684, but not tried until November 21.\textsuperscript{36} In a 1704 case, \textit{Regina v. Paty}, the King’s Bench declared that the House of Commons was the best judge of its own detaining privileges, essentially meaning that “each chamber of the Parliament asserted a power to imprison arbitrarily – a power the Parliaments during the earlier part of the century had struggled to eliminate from the executive branch.”\textsuperscript{37}

\textbf{PARLIAMENT’S SUSPENSION AND ARRESTS}

During the Glorious Revolution, Parliament suspended habeas corpus to prevent the return of James to the kingship, setting a precedent for future suspensions. From December 1688 to February 13, 1689, a provincial form of government took control amid social disorder, as James, now controlling much of Ireland, had his eye on Scotland and attempted to regroup and recapture the throne. Tories ached for revenge against political enemies, Ireland was in revolt, the Jacobites agitated for revolution, and anti-Catholic sentiment raged. Parliament invited William III and Mary to take over during this unrest.\textsuperscript{38}

At times of “exceptional public disturbance,” the King of England exercised extraordinary powers beyond his peacetime authority. The king lost this power in the seventeenth century but reclaimed it during the Jacobite activities between 1689 and 1745, the French Revolution, the war of Empire, and the economic crisis of 1817.\textsuperscript{39}

\textsuperscript{33} Halliday, 241.
\textsuperscript{34} Church, 27.
\textsuperscript{35} Duker, 60.
\textsuperscript{36} Church, 28–9.
\textsuperscript{37} Duker, 60.
\textsuperscript{38} Crawford, 613–6.
\textsuperscript{39} Crawford, 615.
Orders poured out from Parliament, the Privy Council, and the secretary of state to arrest and commit suspects on mere suspicion of conspiring with James II. The institutional mechanisms of habeas corpus collapsed. William and Parliament readied themselves to suspend habeas corpus. Sir Thomas Clayton reminded the House of Commons that without the Great Writ, many among them would be languishing in prison, not legislating in comfort. Despite this admonition, Parliament voted to suspend the Great Writ. For neither the first nor last time, the greatest champions of habeas would turn against it the second it served political expediency.

In March 1689, after less than a day of debate and with one amendment to protect the Parliament’s privilege, the legislators passed “An Act for Impowering His Majestie to Apprehend and Detaine such persons as He shall finde just Cause to Suspect are conspiring against the Government.” Those suspected of “Trayerous Conspiracies of evil” could now be jailed without bail or habeas corpus until April 17. Soon after, laws passed to disarm Catholics and expel them from London, Westminster, and other places. On April 17, the suspension expired and a prisoner named Hamilton along with others petitioned for habeas. They were denied on a technicality. On April 24, Parliament resuspended habeas.

William declared war against Louis XIV and the Nine Years’ War began. Paranoia erupted about the Jacobins and rumor had it that alienated subjects were joining the rebels in Scotland. Court officials faced allegations of corresponding with James. French money was feared to be ubiquitous. On May 22, Whig leader May Richard Hampden moved to continue the suspension of habeas, but this time he confronted resistance from the Tories.

Suspension was debated on May 22, 23, and 24. It passed in the House of Commons, 126 to 83, sailed through the House of Lords, and received royal assent on May 28. This was the last suspension before Scottish army officer Sir George Barclay’s plot to assassinate the king in 1696. When it finally lapsed on October 23, some people were freed and at least one was rearrested. Officials received indemnity for any wrongful actions, another precedent for future suspensions.

Despite its loopholes, the Habeas Corpus Act did place some restraints on the executive. James II wrote to his son in 1692: “‘Twas a great misfortune to the people as well as to the crown, the passing of the habeas corpus act; since it obliged the crown to keep a greater force on foot than it needed otherwise to preserve the government, and encouraged the disaffected, turbulent, and unjust spirits to contrive and carry with more security to themselves their wicked designs.”

But more important, the Act provided no protection against Parliament’s whimsical suspensions. This was its greatest deficiency. As Paul D. Halliday demonstrates

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40 Crawford, 622.
41 Crawford, 618–9.
42 Crawford, 620.
43 Crawford, 624
44 Church, 30.
in *Habeas Corpus: From England to Empire*, Parliament’s habeas struggle against the king had very little to do with upholding liberty but rather reflected its own efforts at amassing and managing power. The biggest culprit behind unjust arrest in the centuries between 1500 and 1800 was not so much the Privy Council or High Commission, but the local justices of the peace, empowered with regulatory authority and the right to jail over a wide range of offenses, as well as Parliament itself, which armed special agencies with the authority to jail people for offenses ranging from violations of alehouse regulations to sewer ordinances. In the sixteenth century, such institutions as the College of Physicians enjoyed legal authority to jail those found violating regulations. Justices of the peace and statutory commissioners could examine witnesses, summarily convict subjects, and imprison them – the same inquisitorial powers of the Star Chamber. In the early seventeenth century, a whole host of statutes was passed, all of which “gave someone a power to jail someone else.” Aside from regulatory matters, much of the imprisonment under the authority of Parliament served the purpose of religious persecution or, during the civil war, to persecute the king’s allies. Between 1642 and 1648, Sir Francis Bacon’s King’s Bench, which was still intact and largely recognized for its authority, released about 75 percent of the prisoners jailed under Parliament’s statutes to promote Protestantism or wage war against the king. And the trial and execution of the king, for that matter, accompanied a decline in “the court’s independence – measured by rates of release on habeas corpus.”

Halliday conducted a most impressive survey of all of King’s Bench’s habeas cases from every fourth year between 1502 and 1798. These cases of 2,757 individuals yielded the estimate of more than 11,000 uses of habeas corpus between 1500 and 1800. Fewer than half concerned violent crimes or property crimes, whereas the remainder involved crimes against the state (high treason, seditious libel, and so on), religious offenses, consensual sexual offenses, firearms and alehouse violations, and so forth. Altogether, he found a remarkable 53 percent release rate for all offenses, including a peak release rate of 80 percent concerning crimes against the state in the period from 1688 through the 1690s. Lord Mansfield, especially, oversaw a flurry of liberation: 80 percent of applicants were released from 1756 to 1788. A wide range of the population – apprentices, fishermen, prostitutes, and others – had access to the writ and could apparently afford the process.

Therefore, habeas corpus was, for thousands of people, a most effective remedy with a great chance of success. Just as interesting, the Privy Council and royal officers were not as active at jailing people as is often assumed. By the mid-seventeenth

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45 Halliday, 151–3.
46 Halliday, 21.
47 Halliday, 31.
48 Halliday, 322–9.
49 Halliday, 54.
50 Halliday, 85.
century, when Parliament began legislating on habeas corpus, most detentions were under justices of the peace. In the 1700s, officers under Parliament’s statutory authority came to dominate detentions, responsible for about 70 percent by the end of the century.\textsuperscript{51}

As for the Act’s supposed practical necessity, Halliday argues that the Act did very little that judges had not already done on their own. Judges already issued writs on vacation and found creative ways to liberate prisoners in ever varying circumstances and places. Judges, without Parliament’s help, expanded the reach of the writ to family matters, demanded ever more detail on returns, stretched the writ to apply as a very effective post-conviction remedy, developed ways to scrutinize facts on returns, especially through affidavit and other process, made the writ into a mechanism for determining POW status, and otherwise refined the venerated legal procedure.

Perhaps the most long-term effect of the Habeas Corpus Act, which continued well into the American experience, was intrinsic to its nature as a legislative usurpation of a common law remedy. Parliament’s intervention into habeas corpus forever enervated the Great Writ’s potency and flexibility by tying it down to statute. Halliday argues that the Petition of Right was mostly an assertion of Parliamentary authority, and that the Acts of 1641 and 1679 did much less to extend habeas corpus than to constrain it, all while leaving Parliamentary detentions free of judicial supervision.\textsuperscript{52} The main effect of the latter act was to “generate a new insistence that statute was required to make the writ effective.”\textsuperscript{53}

**THE EMPIRE’S LEGAL BLACK HOLE**

The debate in the seventeenth century largely focused on the problem of detainees taken to remote places where legal protections did not reach them. The Habeas Corpus Act addressed the question of which locations under English control were nevertheless exempt from the standard protections enjoyed by English citizens at home, but for a century controversy persisted regarding the treatment of detainees on the periphery of the British Empire.

The same year the English founded their first colony in America, the Exchequer Chamber presided over the case of Robert Calvin. Born in Scotland after the English Crown descended to James I, Calvin found himself in legal limbo. Was he an alien, incompetent to bring forth an action in court? The court ruled that the conquest of Christian land does not automatically replace its laws with English laws, but the conquest of infidel lands does trigger the establishment of English law.

_Earl of Derby’s case_ determined that the law did not extend to the Isle of Man, unless statutory law explicitly so extended it. In Blackstone’s _Commentaries_, the great legal theorist wrote that Parliament controlled the British colonies named by statute.

\textsuperscript{51} Halliday, 329.
\textsuperscript{52} Halliday, 213.
\textsuperscript{53} Halliday, 217.
A century later, Joseph Story concluded that British law automatically applied in America because it was a savage land. The Privy Council also held that British law controlled colonies previously governed by infidel laws, including American Indian law.  

If Britain controlled the colonies, should habeas corpus and related protections fully apply there? Historically, habeas corpus was the most universally applicable element of English law – making no substantial exceptions for aliens, so long as the subjects in question fell under the king’s dominion. Habeas corpus even applied in a late sixteenth century case on behalf of aliens accused of trying to poison the queen. A Swedish sailor detained during the Seven Years War had access to habeas, although his claim was ultimately denied. The Great Writ was the main method of freeing aliens, particularly Portuguese sailors, from unjust impressments in the late eighteenth century – and in fact, invoking alien status was often the key to freedom. More than a thousand sailors used habeas in this way with great success. Sir Robert Eyre, Chief Justice of Common Pleas, called the argument that aliens should not enjoy access to the courts “one of the harshest, one of the most impolitic, nay immoral defenses that ever was.” Of course, the conception of English liberty extending to aliens and foreign lands was wrapped up in the logic of royal prerogative and empire, not just concern for the detained. All subjected to the British Empire enjoyed the king’s protection to one extent or another, regardless of nationality. An imperial rationale undergirded this habeas universality.

Moreover, throughout the seventeenth and eighteenth centuries, the practical reach of the prerogative writ to the periphery of the empire was not always clear. There was debate over whether prisoners could be taken to Scotland or Ireland. The crown sometimes took advantage of the ambiguity, as did Parliament and Cromwell in jailing enemies for such crimes as “blasphemy” in Jersey, Guernsey, the Isles of Scilly, and other islands difficult for the law to reach. One of the Habeas Corpus Act’s most substantive provisions was probably the mandating of returns from insular places. In the later eighteenth century, English courts established in the British East India Company’s territories began issuing habeas corpus writs for both British subjects and Indians, seeing their authority as emanating the common law, even before the Crown asserted sovereignty and indeed in the face of Parliamentary efforts to obstruct their practice of issuing the writ.

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54 Duker, 95.
55 Halliday, 205.
57 Halliday, 32, 115, 205.
58 Halliday, 207. Halliday points out that “the King’s Bench sent for prisoners by habeas corpus to Berwick, Bordeaux, and Calais: all places outside the king’s realm and where other aspects of English law did not pertain” (Halliday, 18).
60 Hafetz, Habeas Corpus After 9/11, 85.
As the British Empire expanded its dominion, it empowered local officials with jailing authority and established local courts with habeas authority, all the while constraining the effective reach of the writ through statutory limitations. In the process, the principles charitably associated with habeas corpus — the principles of liberty, rather than royal prerogative and empire — proliferated even as the harsh reality of Britain’s governance of its satellites fell under scrutiny. By the end of the 1700s, the universality of habeas corpus declined, as suspensions of habeas, rather than being general, targeted specific aliens.61

This retraction of habeas coincided with the rise of discontent within Britain’s American colonies. A central theme in the American grievances throughout the eighteenth century concerned the hypocrisy by which Great Britain, which prided itself as the premier champion of individual rights in the world, treated its colonial subjects differently from its subjects at home. The Americans came to love the idealized principles of English law but opposed what they saw as the willingness of British officials to flout these principles at their convenience, a willingness seen in the two-faced champions of habeas who advocated it vocally only to move later to infringe it.

Some scholars have described the American Revolution as the affirmation of English liberties and values through the repudiation of the British Empire. The Declaration of Independence summed up the case against British government, measured against the moral standard of the British conception of law and human rights. The listed grievances included a complaint that echoed back to the habeas debates of the century before: The king had “combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation . . . [f]or depriving us, in many cases, of the benefits of trial by jury [and for] transporting us beyond seas, to be tried for pretended offenses.”62

In 1775, Stephen Sayre, an American-born banker living in London and sympathetic to his home country, was jailed and released on habeas corpus. Ebeneezer Smith Platt, an American arrested in Savannah for allegedly giving English weapons to the rebels, was tried for treason in Jamaica, acquitted, but then detained. The question arose whether he could be detained indefinitely or whether habeas corpus could effectively free him. By early 1777, hundreds of American sailors languished in British captivity, held aboard ships off the coast. The same year, Lord North introduced a bill in Parliament to treat captive Americans as prisoners of war while maintaining a criminal status for rebellion and treason, a sort of legal loophole whereby detainees could lose the protections of POWs as well as the protections of criminal suspects. Suspension of habeas corpus for such Americans was then renewed every year until 1783. Sir Edmund Burke thought treating Americans as

61 Halliday, 256–74.
62 The Declaration of Independence.
enemy aliens manifestly unjust, and that habeas corpus should apply to all or no one.\footnote{Halliday, 251–2.}

As it so happened, habeas corpus was not just one of the niceties demanded by the colonists. It was a key feature of English law that had warmed up the colonists to the common law system in the first place. This soon become a major issue of agitation in the British New World, a rallying cry for Revolution, and a vital element in the restructuring and reformation of colonial law and identity.
The Americanization of Habeas

... For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.

– The Declaration of Independence

Habeas corpus played a key role in fomenting revolutionary ideology in the American colonies. Not only did habeas radicalize the colonists; the colonists soon radicalized habeas, extracted from it the purest pro-liberty element at the core of the judicial writ, and adopted through practice a libertarian version of the writ that prevailed in the late colonial era up until the adoption of the U.S. Constitution. First the colonists had to claim the writ as their own, which happened not so much through inheritance from Britain but with indifference or even hostility toward formal English institutions.

This episode stands in contrast with most of habeas corpus history, as centralizing power is not the driving force behind habeas corpus’s adoption. But power is still a factor, as the colonists struggled for home-rule in the name of liberty. Although England attempted to impose, with restrictions, habeas corpus in the colonies, along with the double-edged sword of English law, the American colonists took habeas corpus from the bottom-up, at least when compared to most other chapters in habeas development. This tale is in many ways an exception that proves the rule, and the betrayal of this radical Americanized common law version of habeas corpus begins as soon as the Americans fight for and win their independence.

AMERICAN COMMON LAW

The transfer of English law to the colonies was not clean. One interpretation of the history sees the common law extending to the colonies, as did all statutes affirming the common law passed before the founding of the colonies, but statutes ratified
after the founding did not. “Usage, precedent and practice were mightier forces than legislation, in extending English law.” Along these lines, the courts “have asserted in so many words that our forefathers brought the common law writ of habeas corpus to this Country.”

Initially, whether habeas corpus applied to the outskirts of the British Empire depended on numerous factors: whether a statute had extended protection from England, whether a conqueror had established it, whether an assembly or province adopted it for itself (and had not seen its adoption vetoed by the Crown), and whether there was “long interrupted usage, or practice.”

According to popular wisdom, Queen Anne gave habeas corpus to the American colonies along with other common law traditions in personal liberty. Much of this understanding rests on a famous statement by Chalmers in which he declared that “the Queen gave unsolicited” to the colonies “the benefit of the habeas corpus act.” But this was likely a symbolic extension that applied to the Virginia colony, which probably already effectively had the right to habeas, although bail was the more common procedure to protect the liberty of the detained.

A 1651 Virginia assembly provision asserted that the colony fell under the Commonwealth laws. In 1660 and 1661, the preamble to a revision of statutes reasserted the force of English law in Virginia. Not until 1719 did Anne extend the Habeas Corpus Act to Virginia through a proclamation by Governor Spotswood. The flowery language made provisions for felony and treason cases, but it only provided for the removal of a justice as recourse, established no remedy for recalcitrant governors, and applied only to bailable laws. It did not have the force of the English Habeas Corpus Act, and allowed a lot of discretion to judges who could refuse bail. But aside from these limitations, the proclamation arguably did not give Virginians anything they did not already have.

2 Duker, 99.
3 Church, 31.
4 Carpenter, 18, 24.
5 Duker, 99–100.
6 Carpenter, 25–6.
7 By this time, Virginia’s people already respected habeas corpus. In 1736, the colony, expanding the writ in accordance with the tradition of the writ’s evolutionary nature, even extended habeas corpus to civil cases (Duker, 110–1). This extension would not enjoy codification in England for another century (Carpenter, 26). The movement to legislatively apply habeas corpus to civil cases hit a pinnacle in 1758, when a bill was proposed to do just that, as well as to designate sheriffs and officers of court in violation of writs “guilty of contempt of the court” (Mian, English Habeas Corpus, 49). But by then, the judges had long been using habeas in civil cases – especially in family disputes, first generally in favor to husbands, and later to protect women and children from abusive and violent men (Halliday, 123–4). Chief Justice Matthew Hale had developed such habeas use in the century before the legislative effort failed.

A 1758 bill would have also forced judges to issue the writ as a matter “of course” – automatically, beyond their discretion – as opposed to “of right.” An eleven-judge panel was convened to give its
Edward Randolph, director of the plantations, issued a report in 1700 that said colonists should enjoy habeas corpus protections. By the time Queen Anne extended habeas to Virginia, the colonies, not just in Virginia, had already had a fair taste. Moreover, because her proclamation occurred before the Foreign Jurisdiction Act, the legal force of her proclamation falls into question.

Because of habeas’s background as both a common law and statutorily defined procedure, scholars have long disagreed as to whether common law or statute implanted habeas in colonial soil. Many credit the spread of common law from England to the colonies for bringing with it the Great Writ. In 1720, the lawyer Mr. West declared: “The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law passed in England antecedent to the settlement of the colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes made since those settlements are there in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear.”

Nine years later, Attorney General Yorke averred:

I am of opinion that such general statutes as have been made since the settlement of Maryland, and are not by express words located either to the plantations in general or to the Province in particular, are not in force there, unless they have been introduced and declared to be laws by some Act of Assembly or the Province, or have been received there by long uninterrupted usage or practice.

In early colonial America, legal practice took on a primitive quality in its development. As in Anglo-Saxon England, tradition and custom dominated, and legal norms differed radically from one place to another. The law was not very technical, largely because there were not many lawyers and not much legal study. Just as important, pre-trial detention was so rare that there seemed no need for habeas.

input on habeas corpus reform and concluded: Habeas corpus should issue upon probable cause and affidavit, not as a matter of course; judges could issue writs not covered by the 1679 Act while on vacation but common law judges did not have to; writs during vacation should not have to be returnable immediately; there was no remedy if a judge refuses to issue the weir; during term, judges can compel obedience to the writ only after alias and plurès; the 1679 Act did not apply to pressed men; and judges ought not consider the veracity of a return unless it was unambiguously false. The panel did not come to a consensus on questions remaining about the issuance of writs during vacation.

Probably because it would have made habeas a writ of right and would have undermined the power of judges on their own on vacation to enforce obedience to their writs – probably because on both fronts, it weakened judicial discretion – the bill of 1758 failed. But one scholar points out that they could have tried to make amendments to address such issues upon second consideration, implying that the real objection had to do with giving too much advantage to prisoners. In 1816, another Habeas Corpus Act empowered judges to issue writs while on vacation in civil cases, enforce laws against contempt, and scrutinize the truth of returns (Mian, English Habeas Corpus, 53, 56–7).

8 Carpenter, 19.
9 Church, 31.
10 Carpenter, 19.
In New England, the popular law – *Volkrecht* – dominated, and the secondary law was religious. In Massachusetts, a 1636 resolution declared all law legitimate that was “agreeable to the word of God.” It made no reference to the common law. In a somewhat crude form of equity law, the magistrates tended at first to reject written law. The people did not believe customary law clashed with English law, but rather that written law might. In 1641, the Body of Liberties, the first legal code created by colonists in New England, affirmed the right of magistrates to adhere to English law. It was recognized that “in all criminal offenses where the law hath prescribed no certain penalty, the judges have power to inflict penalties according to the rule of God’s word.” The criminal law was based on the Law of Moses in what was in effect a Puritan theocracy. God’s law was seen to supersede legislative acts as early as 1657 in *Giddings v. Brown*, an eminent domain case. Judges sometimes used the common law as an illustrative tool, borrowing from its vocabulary to make judgments, and sometimes consulted its reasoning. But the natural law was considered binding. Processes lacked the sophistication they had in England – up to 1647, pleas conducted in Massachusetts inferior courts were given orally. At one point, juries were temporarily abolished before their restoration in 1652, and their decisions were not final – magistrates could overrule them up until 1672.

Despite the invocation of common law for the purposes of illustration, language, and serving as a model for contracts and deeds, the common law did not even enjoy subsidiary authority. This homogeneous Puritan community saw law as simply that which was consistent with God. In 1646, Robert Child led a group demanding English law for Massachusetts, but the response was that it was unnecessary, because English law, assumed to be in line with God’s law, was thus already consistent with colonial law, which was surely itself consistent with God’s law.\(^\text{11}\)

In 1677, the Privy Council objected to Massachusetts laws repugnant to those of England, including the prohibition of Christmas and the law for Quakers. The general court of Massachusetts responded that it was independent of England’s law. In 1688, Sir Edmund Andros commissioned the appointment of a council and governor to try criminal and civil cases consistent with the law of England. Ironically, resistance to what was seen as usurpation by England, rather than acceptance of England’s attempts to share its custom with Massachusetts, encouraged the colonists to look upon common law and habeas corpus in a new favorable light. As Paul Samuel Reinsch explains:

The arbitrary government of Andros . . . did more to introduce a knowledge of the common law, than this provision [by him], because against his despotic rule the colonists now began to assert rights protected by the English law, such as the right of Habeas Corpus. Thus when we hereafter find expressions of admiration for our adherence to the common law, such as are very common in the succeeding century

and especially at the beginning of the Revolutionary War, they refer rather to the
general principles of personal liberty than to the vast body of rules regulating the
rights of contract and property and the ordinary proceedings in court.12

Unfamiliarity with and hostility toward English law prevailed throughout the New
England colonies. Connecticut had scriptural law, copying legal language from
Massachusetts in 1642. “If possible, these colonies [Connecticut and New Haven] departed even further from the common law than Massachusetts.”13 New Hamp-
shire and Vermont, populated by discontents from the Puritan colonies, were more receptive to the common law but asserted their legal independence in 1679 and 1680, even as they declared at the same time that they were entitled to all the rights of free Englishmen. Weak and poorly read juries and judges, who possessed very little law background until the mid-eighteenth century, rendered these colonies fairly alien
to the common law, and they remained that way for the better part of the century. Rhode Island elected its judges until the American Revolution, a practice not exactly familiar to common law.14

The diversity in New York eventually made it more receptive to common law,
and it became the leading colony in developing the American version. But as late as 1683, even as New York convened its first legislature and the governor retained most power, the colony had no courts. Governor Nichols wrote to Clarendon in 1666, seeking a clear codification of the common law, because an unwritten law would be harder to transfer to the colonies. Probably as late as 1700, the executive branch ran the courts and there were very few trained jurists. Lawyers were very unpopular. Somewhat paradoxically, not until the eve of the American Revolution did English law gain widespread acceptance, when the governor issued reports affirming English law as the “fundamental law of the province.”15

West Jersey was a Quaker commonwealth, whereas East Jersey more closely resembled New York with its popular courts. In 1675, the legislature finally created a court system. In Delaware, no professionally trained judges held office before the American Revolution. On a visit to the territory that became Pennsylvania, Lord Petersboro found shocking the “simplicity and fewness of laws, the absence of lawyers and the informality of judicial proceedings.” In 1673, county courts were established, but the processes were somewhat ad hoc and the juries apparently varied in their numbers of members. In the 1680s, Pennsylvania codified many of its laws. But equity and law were essentially united in both practice and jurisdiction. Not until 1701 did a lawyer become chief justice.16

In Maryland, the proprietor had most of the power with little oversight from the
Crown. He granted titles of nobility and created courts, rejecting the legislature’s first attempt to legislate in 1635. In turn, in 1637, the assembly rejected his laws, leading

12 Reinsch, 23–4.
13 Reinsch, 26.
14 Reinsch, 27–9.
15 Reinsch, 30–4.
16 Reinsch, 34–40.
to “the absence of a code of positive laws” such that the colonists “claimed that they were governed by the common law of England so far as applicable to their situation.” In 1662, Maryland became home of “the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions, and to reject provisions deemed unsuitable.” Another conditional adoption occurred in 1732.17

Early seventeenth-century Virginia featured something akin to Anglo-Saxon courts. The colony’s statutes of 1661 and 1662 revealed a respect for English common law but with a questionable technical depth. The colony evinced particular hostility to lawyers. The Carolinas most likely had a decentralized legal system, adopting common law in 1712, except where deemed inapplicable. A 1715 North Carolina declaration assumed the common law “so far as shall be compatible with our living and trade.” Charleston had a central judiciary with common law, but did not effectively control most of the South Carolina colony.18

With the exception of Virginia, no colonies had circuit courts throughout the seventeenth century. There were legal codes, except in Maryland, and some of those codes, “like those of Massachusetts and Pennsylvania, departed in many essentials radically from the principles of the common law [and] their framers consciously desired to meet the entirely novel conditions of the colonists by new and appropriate legal measures.”19 While Maryland, Virginia, and the Carolinas adopted common law before the other colonies, even there the law was at best subsidiary. In Massachusetts, Connecticut, New Haven Colony, and to some degree New Jersey, scriptural law ruled.20

Common law became accepted and celebrated in colonial life because of a general appreciation for the ideas of freedom rather than a respect for the king’s authority. Colonists regarded Magna Carta as the “sufficient embodiment and expression” of English law for all purposes, and “[m]ost of the colonies made their earliest appeals to the common law in its character of a muniment of English liberty.”21 But they generally rejected English common law as an authoritative restriction on colonial independence. English legal decisions became respected as a guideline, but their applicability to the American scene was of greater importance, whereas decisions in American courts always enjoyed the respect of precedence.22

**COLONIAL HABEAS CORPUS**

As for habeas corpus, it was the liberating power rather than the centralizing structure that inspired the colonists and motivated them to incorporate the writ into their

17 Reinsch, 41–3.
18 Reinsch, 46–50.
19 Reinsch, 51–3.
20 Reinsch, 53–5.
21 Reinsch, 56–8.
legal order. It became a major component of the revolutionary method by which the Americans developed the common law by claiming it from their imperial homeland as it suited them. Although most colonial charters affirmed the liberties and rights of Englishmen, habeas corpus developed outside the framework of the Crown’s charters in Connecticut and Rhode Island. Indeed, Badshah Mian contends that the typical narrative of habeas corpus migrating to America along with the common law is backward, that “[c]ontrary to the popular opinion, it was habeas corpus that facilitated the partial reception of the common law, and not vice versa.” He argues that American colonists, mostly indifferent to the common law, began using the writ to assert their status as freemen. Habeas enjoyed considerable popularity before the rest of England’s legal traditions, and its use graced the colonies years before Queen Anne famously gifted habeas to Virginia.

In 1687, through common law and not statute, Massachusetts provided its citizens with the right to removal from inferior courts to the supreme court through habeas corpus or certiorari. Not that it always worked. In 1689, officials arrested Reverend Wise of Ipswich with five others for refusing to follow an order to raise money. He unsuccessfully applied for a writ to Judge Dudley, citing his rights in the Magna Carta and arguing the tax had been levied without legislative approval. His treatment faced criticism in a pamphlet titled “An Account of the Later Revolution in New England.”

A 1682 provision of Pennsylvania law recognized habeas corpus, guaranteeing that illegally detained prisoners should have access to not only the writ, but also a claim to double damages against the informer and prosecutor. This law was soon abrogated, but then reenacted in 1693.

In March 1684, New York’s Charter of Liberties proclaimed the connection between living under English rule and enjoying the privilege of the writ: “That the Inhabitants of New York shall be governed by and according to the Laws of England,” it affirmed, while clarifying that “[t]his Privilege is not granted to any . . . Plantations where the Act of habeas corpus and all such other Bills do not take Place.” Although this was vetoed because the Habeas Corpus Act did not officially extend to the colony, the common law practice of habeas did control in New York. For example, the common law writ was issued in the Fransa Case to reverse custody on a wrongful charge. Responding to the New York Leisler Rebellion of 1689, Lieutenant Governor Jacob Leisler ordered arrests of those who resisted his

23 Duker, 101, 112.
25 Mian, American Habeas Corpus, 56; Duker, 102; Church, 32–3.
26 Carpenter, 23.
27 Carpenter, 21.
28 Duker, 108.
tax enactments that had not had legislative approval. He arrested Philip French’s Indian slave, and when French complained, he arrested him, too. The mayor’s court issued a habeas writ, and Leisler ordered that French’s windows be nailed shut. He claimed not to be a subject of the king and therefore not bound by his law. The prisoner had to plea to be released. But habeas was winning over hearts and minds, as spectators booed and hissed the court for its failure to return upon receiving the writ. In 1707, two New York Presbyterian ministers, Makemie and Hampton, were arrested for preaching without a license. Their application for habeas was accepted, but they were ultimately tried.

In 1692, Massachusetts passed a habeas corpus act modeled after England’s. The colony’s law provided for release even in felony and treason cases. The Privy Council, however, disallowed it, reasoning that “[w]hereas . . . the writ of Habeas Corpus is required to be granted in like manner as is appointed by the Statute 31 Car. II. In England, which priviledge has not as yet been granted to any of His Majtys Plantations, It was not thought fitt in His Majtys absence that the said Act should continue in force and therefore the same is repealed.”

Even rejections of petitions for the writ after the repeal of the Massachusetts Act often turned on details and implicitly conceded the legitimacy of habeas corpus in principle. Chief Justice Sewall rejected a writ in Massachusetts, but “there is nothing to indicate that the court regarded it as a novel application.” In December 1705, he wrote in his diary that he had issued the writ, implying it was a common law practice. In 1706, Sewall considered an application for the writ rather than rejecting it outright.

The 1701 Charter for Delaware upheld common law rights, including habeas corpus, with the concession that the English Act did not apply. In 1719, the power to issue writs was granted to the Delaware Supreme Court.

The South could boast the most robust habeas tradition. The Carolinas practiced habeas corpus early on. The public wanted to release pirates who had pillaged the Great Mogul, and the state had no other way to process their release. A bill of indemnity was rejected, but in 1692 colonial legislation incorporated English habeas corpus in the colony and empowered magistrates to issue the writ. In 1712, a new law repealed the 1692 Act, establishing new procedures for the chief justice and proprietors to enforce the English Habeas Corpus Act as “fully, effectually and lawfully as any Lord Chancellor, Lord Keeper, or any of Her Majestie’s Justices,

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29 Duker, 110; Carpenter, 22.
30 Church, 35; Duker, 110.
31 Carpenter, 22.
32 Carpenter, 21.
33 Church, 32.
34 Carpenter, 21–2.
35 Mian, American Habeas Corpus, 56.
36 Duker, 114.
37 Duker, 103.
either of the one Bench, or the Barons of the Exchequer.” The judge would have this power “as if he were personally in the said Kingdom of England.” This language invoking the authority of the Crown remained in effect until the early nineteenth century. In 1730, the Carolinas Assembly detained Thomas Cooper for agitating against land speculators. Chief Justice Robert Wright issued the writ. The legislature ordered the House messenger to disobey the writ, and for Cooper’s lawyers to be taken into custody. The assembly asserted the right to detain people without habeas corpus, giving immunity to public officials who ignored habeas in executing legislative detentions. In 1749, North Carolina enacted an extension of the Habeas Corpus Act, the Petition of Right, and the Magna Carta to its jurisdiction.

Years before Queen Anne’s Proclamation and a century before the American Revolution, colonists began to take habeas corpus for granted. Perceived abuses faced public and political criticism. On August 5, 1684, Mr. Vaughan, a resident of New Hampshire, petitioned for the writ under the Habeas Corpus Act. The writ issued but he was returned to jail. In April 1689, “The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston and the Country Adjacent” complained about the denial of the writ. In 1710, the New Jersey Assembly denounced Judge William Pinhorne for refusing to issue the writ to Thomas Gordon. The judge’s son had him freed on bail after fifteen hours.

The colonists adopted habeas in their own way, copying portions of the Habeas Corpus Act word for word, incorporating it into their common law, or affirming it through practice and legislation. As for the rest of common law, the colonists remained skeptical toward it, particularly its associations with English rule. The Crown used common law to impose its will on the colonies and centralize its own power. In 1677, the Privy Council amended Massachusetts to establish its own law through charter. Colonial bills submitted for royal assent were frequently rejected. In the process of imposing English law, the Crown obstructed efforts to institute the writ. When the General Assembly of Pennsylvania attempted to enact habeas corpus, the Crown repealed it. When South Carolina provided magistrates with the power to enforce the 1679 Habeas Corpus Act, the proprietor reversed it. When the Massachusetts Assembly attempted to adopt habeas protections, the Crown annulled them. Even as the colonists became interested in importing the writ more so than the rest of the common law, the English government preferred to export its legal system while denying its colonial subjects the right of habeas corpus.

Moreover, a rigid set of jurisdictional rules, inappropriate to the colonial experience, accompanied the structure of English common law. Only the Westminster courts could officially issue the writ for the colonies. Colonial courts could not. By

38 Church, 23, 33–4; Carpenter, 23.
40 Carpenter, 22.
41 Church, 33.
42 Church, 34; Carpenter, 23.
the time of the 1640 Habeas Corpus Act’s passage, which empowered the courts of Common Pleas and Exchequer, English courts gained jurisdiction primarily through legislation. English courts that had preexisted Parliament, namely King’s Bench and Chancery, did not require legislative empowerment to issue writs, but newer courts did. The Parliament never gave colonial courts the jurisdiction to issue habeas writs. While the 1679 Act may have endowed colonial subjects with the procedural right of habeas corpus, no competent courts could execute it. The growing practice of habeas corpus in the colonies thus stood in defiance of royal authority. In the late seventeenth century, discontented with royal governance, the colonies began more loudly demanding and officially adopting habeas through their own local jurisprudence.  

Whereas it took centuries for the Great Writ to become an instrument of subversion rather than subjugation in England, the adoption of this medieval relic was, in America, revolutionary.

WRIT AND REVOLUTION

From the early seventeenth through the mid-eighteenth centuries, a period occurred that historians have described as characterized by “Salutary Neglect” – an unspoken policy of Britain leaving the American colonies alone – because there seemed little need for formal independence. As fear of executive power’s abuses fell to a low, so too did colonial fascination with habeas.  

As the colonists began feeling increasingly oppressed by the Crown, they began asserting their rights as English freemen with legitimate grievances against the English government. Writings such as the 1721 Boston tract “English liberties, or the Free-born Subjects’ Inheritance” appeared, and colonists became ever more fascinated by and respectful of Magna Carta, habeas corpus, and liberties under the English system. Citing precedents in England, they also tended to eschew martial law. The view that common law protections were a matter of birthright became incorporated into their rhetorical dissent from the English Crown all the way through the Revolution.

The colonial governments were not always on the side of liberty. In exceptional cases, the English government invoked habeas corpus against the vagaries of colonial local government. In 1759, the Privy Council ruled that the Pennsylvania assembly could not suspend habeas corpus after it had imprisoned Judge William Moore and Reverend William Smith on the grounds of libel.

By this time, the colonists themselves had claimed the great common law writ, mostly through processes independent of any official imposition by the Crown. By the late eighteenth century, the colonists had extracted from the English common

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43 Mian, American Habeas Corpus, 50–4.
44 Duker, n6.
46 Mian, American Habeas Corpus, 60–1.
47 Rothbard, Conceived in Liberty, 154.
law the underlying notion of liberty principally as a means of resisting power. Ide- ological considerations stood at the forefront of discourse over power and governance, and beyond the range usually seen in England over common law. As Bernard Bailyn has written:

Belief that a proper system of laws and institutions should be suffused with, should express, essences and fundamentals – moral rights, reason, justice – had never been absent from English notions of constitution. But not since the Levellers had protested against Parliament’s supremacy in the mid-nineteenth century had these considerations seemed so important as they did to the Americans of the mid-eighteenth century.\(^4^8\)

The American colonists valued English common law in its idealized form – the Magna Carta\(^4^9\) and habeas corpus and other rallying cries for individual liberty – just as minorities like the Levellers and Puritans had done so in their struggles in England. But where the natural law or colonial law appeared to differ with English custom or power, Americans questioned English authority. English custom and law “marked out the minimum not the maximum boundaries of right.” Colonists came to respect most in all of English law the principle of liberty over power – “natural rights whose essences were minimally stated in English law and custom.”\(^5^0\) And it was not the royal government that they credited for this meaning of common law. Rather, “the period before the Norman Conquest was [widely seen as] the greatest age of English liberty.”\(^5^1\)

The conflict between English power and English liberty as they applied to the colonies took center stage in the eighteenth century tensions that culminated in war for independence. The debate over habeas corpus had a distinct role in this battle. In response to the Maryland governor’s insistence that the Habeas Corpus Act did not apply to Maryland (or to Ireland), Daniel Dulaney argued that insofar as there is equal obedience of laws there must be equal rights; that if the common law governed the colonies, so too must a reinforcing statute like the Habeas Corpus Act. That argument was published in one of Cato’s letters, the pamphlets that helped shape the eighteenth-century conception of Americans as free and independent.\(^5^2\)

By the time Americans found themselves agitating for independence, habeas corpus had wide public support as an American right, something above and beyond the caprices of English jurisprudence and governance. All thirteen colonies had the


\(^{4^9}\) John Dickenson wrote in 1776: “Magna Carta itself is in substance but a constrained declaration, or proclamation and promulgation in the name of King, Lords, and Commons of the sense the latter had of their original, inherent, indefeasible, natural rights” (*An Address to the Committee of Correspondence in Barbados*, quoted in Bailyn, 78).

\(^{5^0}\) Bailyn, 78–9.

\(^{5^1}\) Bailyn, 80.

\(^{5^2}\) Duker, 108.
common law writ in 1776, with especially profound and authoritative traditions in the southern colonies – particularly Virginia, North Carolina, South Carolina, and Georgia.\(^{53}\)

While the American fascination with habeas persisted through the Revolutionary period, the rhetorical infatuation with common law was transient. In 1774, the Continental Congress declared that the English Constitution, rather than English common law, protected Americans. Along these lines, Thomas Jefferson spoke more favorably of “the rights of men” rather than English rights.\(^{54}\)

Britain’s Quebec Act reestablished civil law in Canada in 1774, denied the right to trial by jury, and reestablished Catholicism and the French language. Although anti-Catholicism and a fledgling American tendency toward Manifest Destiny inspired discontent with the Act in America – and although it probably encouraged the American invasion of Canada during the Revolutionary War – the Quebec Act’s perceived denial of habeas corpus also genuinely concerned colonial Americans.\(^{55}\) The Continental Congress called it a stark example of British tyranny. Americans, wishing to absorb Canadians into their embryonic nation, tried to draw them in with promises of habeas corpus.\(^{56}\)

Once the war began, however, some champions of habeas discovered that it sometimes interfered with their own priorities. Late in the American Revolution, Virginia suspended habeas corpus for traitors to the revolutionary cause. The legislature empowered the government “to apprehend or cause to be apprehended and committed to close confinement, any person or persons whatsoever, whom they may have just cause to suspect disaffection to the independence of the United States or of attachment to their enemies, and such person or persons shall not be set at liberty by bail, mainprise or habeas corpus.” Not until 1830 did Virginia reaffirm habeas as a protection by enshrining the privilege in its state constitution.\(^{57}\) Once again, the party of power had turned its back on civil liberty.

Although the Revolutionary War witnessed the first of many retreats from the principles of habeas corpus for the new United States, official respect for it blossomed during this period and its immediate aftermath. The Revolution ushered in statutory guarantees of habeas. In 1777, Georgia put a protection of habeas in its constitution. In 1789, New York adopted an Act modeled after the English Habeas Corpus Act. New Jersey followed suit in 1795.\(^{58}\)

While appreciation for habeas persisted, the period after the Revolution marked a backlash against English common law, once again demonstrating the subversive Americanization that had occurred with the writ. Delaware, Kentucky, New

\(^{53}\) Duker, 115; Carpenter, 26.


\(^{55}\) Although, in practice, habeas was probably not actually suspended by the act (Halliday, 278).

\(^{56}\) Duker, 115; Church, 36; Mian, *American Habeas Corpus*, 61.

\(^{57}\) Duker, 101.

\(^{58}\) Duker, 106, 111; Carpenter, 27.
Jersey, and Pennsylvania even outlawed the citing of English decisions after Independence. At the same time, many of the idealized concepts of English law were still celebrated. From the 1760s through 1805, Blackstone was one of the most widely read legal theorists along with Locke and Montesquieu. In the mid-nineteenth century, the American common law began earnestly taking on a life of its own.

Common law in early America had many differences from the English variety, reflected by habeas’s radically distinct development in the colonies. Whereas the writ began in Britain as a royal power move to control lower judicial bodies, in America the public, judges, and colonial authorities claimed it for themselves, despite the disinterest or even hostility coming from England. Whereas in England, royal courts and Parliament granted protections to subjects who then saw them taken away at the whimsical prerogative of the highest political authority, American habeas corpus developed in the lower court system, free from the historical baggage of statutory formality or monarchical politics.

The colonial charters that claimed an extension of the Habeas Corpus Act, along with Queen Anne’s proclamation, were on dubious legal ground even under the standards of English law. Nevertheless, the colonies imported the writ because it fit their needs and desires. They liked the language of the Act and took it for themselves. Through their experimentation in the court system, the American people first incorporated habeas in their legal systems in the practice of common law, a common law that itself was only as English as the Americans practiced it. The American legislatures demanded it in proclamations and charters and then put it in their state constitutions when they threw off the yoke of the world’s premier imperium, and claimed independence, picking and choosing from the British system those principles that most complemented the libertarian spirit of their revolution.

The colonists hailed their right to be free from unjust detention. As people of British stock, they claimed habeas corpus as a birthright, but they also rejected the British government’s authority to define and circumscribe this right. First demanding English rights while using English law as cover, then insisting on English rights under American law, then seeing those rights less in terms of the British legacy but rather in terms of their own national identity and, at their most admirable of times, as a function of their status as human beings, the American colonists claimed their independence. This included independence as it concerned the Great Writ of Habeas Corpus, as the colonists undertook a revolution to overthrow their rulers in the name of self-determination.

As of 1789, only three states had habeas guarantees in their constitutions, although all of them practiced common law use of the writ. This only speaks to the extent

59 Mian, American Habeas Corpus, 62.
that the colonists took the writ for granted. As a purer common law right and a
more populist cause than it had been in England, American habeas corpus was no
longer something the British government could review, veto, or suspend. Tradition
and the memory of revolution, along with the colonies’ new status as free and
independent states, would ensure that habeas corpus would never be in systematic
peril throughout the country. Some state constitutions made the writ irrevocable.
Given the common law nature of habeas, it was not yet known whether even an act
of a state legislature could stop a court from issuing the Great Writ to vindicate the
rights of a wrongly detained individual.

However, this decentralized, anti-royal, revolutionary conception of habeas corpus
did not last long. With the adoption of the federal Constitution and its Suspension
Clause in 1789, the key power to suspend habeas corpus was transferred from the
states to a new central government, and the American understanding and practice of
habeas corpus underwent a judicial and legislative transformation that has continued
to this day. At first, the transformation was modest and peripheral, and habeas would
frequently still take on the radical, decentralist, and distinctly American character
that had defined it in colonial life. But within a century of its inclusion in the U.S.
Constitution, the Great Writ became turned back on its head so as to resemble the
British species, a writ to be imposed from above.
The Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume.

– Thomas Jefferson

Habeas corpus enjoyed a century of American precedent by the time of the Constitutional Convention. In this light, the Constitution’s Suspension Clause, long celebrated as a great protector of a cherished civil liberty, in fact has aspects of redundancy and even qualifies as a counterrevolution against the radicalism of colonial habeas corpus. Indeed, this clause came about as a nationalization of power and as a usurpation of the states’ authority to protect citizens against the central state. The rise of American military law and the details of the Supreme Court’s decision Ex parte Bollman also demonstrated the precariousness with which the new national government guarded habeas corpus and its underlying principles of due process.

CENTRALIZATION AND THE SUSPENSION CLAUSE

Soon after the colonies gained their independence from Britain, powerful political forces began agitating for a centralized American state. The Constitution of 1789 created such a state, celebrated ever since for its presumed strength as a bulwark of American liberty. Not least of the reasons has been the Constitution’s language on habeas corpus. Yet, ironically, the language defending this great procedural privilege pertains specifically to the privilege’s suspension. Whereas a decentralized, anti-authoritarian conception of the writ defined the colonial era, the Constitution, in its most revered defense of habeas corpus, once again placed the matter in the hands of central authority, reversing the radical gains made in the Americanization of the writ and returning it back on a path to becoming a centralizing and opportunistic political instrument similar to the English variety.

1 Thomas Jefferson to A.H. Rowan, 1798. ME 10:61.
In 1787, the Congress of the Confederation affirmed the importance of habeas corpus in the Northwest Ordinance. As the Constitutional Convention began, three of the twelve states had habeas protections in their own state constitutions. (Rhode Island had not yet adopted a constitution at all.) Georgia’s constitution protected the writ, Massachusetts allowed for a twelve-month suspension limit, and New Hampshire allowed three months. North Carolina’s constitution did not explicitly mention habeas, but it did allude to the principle that citizens would enjoy protection against unlawful imprisonment. Some colonists may have found such habeas clauses unnecessary, believing that the common law already ensured the writ or that alternative safeguards were adequate. Whereas some believed that habeas corpus existed outside of constitutional language, others wanted an express constitutional protection. Among those, some wanted the Constitution to bar Congress from ever suspending the writ. In the era of the late Revolution through the period following the Constitution’s ratification, states ironically drew more inspiration from the examples set in Britain (along with their own colonial history) than from the authority of their own new national government. The Judiciary Act of 1789 was less important a model than the English Habeas Corpus Act of 1679. This phenomenon had subversive implications. As the English government ceased being a threat to American liberty, it once again became safe to look upon its traditions for inspiration.

Virginia enacted a habeas statute in 1784, Pennsylvania did so in 1785, followed by New York in 1787 and New Jersey in 1795, and each state mirrored the language used in English law. Georgia and South Carolina copied the English language so loyally that it anachronistically designated those declared competent to issue the writ in vacation to be the “Lord Chancellor or Lord Keeper, or any one of his majesty’s justices, wither the one bench or of the other, or the barons of the exchequer of the degree of the coif.”

After habeas became enshrined in the U.S. Constitution, Georgia, Maryland, and South Carolina adopted similar language in their own state constitutions. Twenty states that joined the union before the Civil War followed suit. Virginia established total protection against suspension in 1830 and Vermont did so in 1836. States that joined the union later borrowed provisions from previous states, thus English law continued to carry weight.

Early on, some states acknowledged that the jurisdiction conferred by statute did not preclude the common law power judges had come to claim. Statutes in Massachusetts, New Hampshire, Rhode Island, Pennsylvania, and Delaware clarified who could issue the writ during term, but “[t]hese statutes were remedial by nature and did not supplant the powers that the courts had acquired independent of legislative measures through adoption and long use during the colonial period.” Although the statutory law affirmed the writ, and although some statutes extended

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The Power of Habeas Corpus in America

habeas protection (such as laws in Massachusetts and Pennsylvania applying it to civil cases), the fundamental power of judges to discharge prisoners was seen as part of the fabric of American common law.

By the time of the Constitutional Convention, habeas corpus had become an incredibly popular component of the law and was thus the subject of serious deliberation at the convention and the following public debates surrounding ratification. In Charles Pinckney’s 1787 “Draught of a Federal Government,” he proposed protection for habeas. In August of that year, he suggested the protection read, “The privileges and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasion and for a time period not exceeding” a time limit of however many months. This language went to the Committee of Detail without debate. When it hit the convention floor, controversy arose. John Rutledge of South Carolina “was for declaring the Habeas Corpus inviolable – He did not conceive that a suspension could ever be necessary,” according to James Madison’s notes. Luther Martin of Maryland believed that if habeas ever needed suspending, the state governments could do it, but the power to suspend would become “an engine of oppression” in the hands of the national government.

Ultimately, the Suspension Clause was approved without a time limit, but with the vague qualification as to when habeas could be suspended. In Article I, Section 9, dealing with congressional authority, the U.S. Constitution reads:

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.

When the Constitution was drafted and put up for ratification by the states, a great public debate transpired between the so-called Federalists who supported it and the so-called Anti-Federalists who feared the document authorized too much power for a new national government. Federalists such as Alexander Hamilton responded to Anti-Federalist complaints that the Constitution had no Bill of Rights by touting its inclusion of habeas corpus, a remedy against “arbitrary imprisonments [which] have been in all ages the favourite and most formidable instruments of tyranny.”

Yet a deeper controversy existed concerning the doctrine of enumerated powers. The Federalists claimed that the new federal government’s powers would be specifically and narrowly defined – unlike all governments the world had ever seen,

5 Duker, 127.
7 Quoted in Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty, 13.
8 U.S. Constitution, Article I, 39.
the U.S. government could only do those things that the Constitution particularly authorized. The Anti-Federalists were skeptical of this selling point, including as it concerned the issue of habeas corpus. The very fact that the Constitution would include explicit protections of habeas corpus seemed to undermine the notion that the federal government enjoyed only those powers specifically delegated to it. An Anti-Federalist pamphlet read:

We find they have, in the 9th section of the 1st article, declared, that the writ of habeas corpus shall not be suspended, except in cases of rebellion. . . . If every thing which is not given is reserved, what propriety is there in [the Suspension Clause]? Does this constitution anywhere grant the power of suspending the habeas corpus . . . ? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted.

A common and not so reassuring Federalist response argued that “the Clause was in fact a grant of power to the federal government” to suspend habeas corpus, albeit in limited circumstances – which raises the important question of whether the clause actually protected anything that would have needed protecting had the clause never been adopted. Indeed, the Anti-Federalists found the power to suspend habeas to be a frightening one, essentially arguing that “[t]he Congress will suspend the writ of habeas corpus in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the judge? The usurper.”

The extent of the constitutional protection of habeas corpus was not a settled question in 1789, and to this day such questions as what suspension of habeas in America actually entails continue to arouse debate. The continued ambiguity goes back to the organic way habeas became established in the colonies and the vague language finally ratified in the U.S. Constitution. Putting aside the fundamental issue of whether the Suspension Clause created a new privilege or simply eroded an existing one, the clause raises other questions as to what constitutes an invasion or rebellion, and who decides when the public safety requires suspension. Other questions included the matter of who has the power to suspend habeas corpus, what the suspension would entail, and, perhaps most important, in the wake of the new constitutional order, who has the power to issue the writ.

What suspension meant was up to some interpretation. In Britain, suspension worked differently, effectively creating a class of offenses to which the Habeas Corpus Act did not apply. Prisoners who could show the suspension act did not apply to them still had access to common law habeas corpus. England suspended habeas in this manner in 1794, in 1817 in response to insurrection, and in 1866 in response to the Fenian uprising in Ireland. Each suspension involved a time limit.

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11 Freedman, 16.
12 Freedman, 17.
United States, suspension does not preclude the writ, but rather the remedy. The writ still issues and the custodian still sends a return, simply noting that habeas has been suspended.\textsuperscript{14} It is the privilege, not the process, that undergoes suspension.

As to which governing body has the power to suspend the writ, one early draft of the constitutional language did specify the legislature. Much of the assumption that the power lies with Congress arises from the Suspension Clause’s location in Article I, defining Congress’s power.\textsuperscript{15} Another early draft, however, had the language in Article III, describing the judicial branch, until the Committee on Style and Arrangement placed it under Article I.\textsuperscript{16} The placement alone is not decisive as some have argued. Some provisions in Article I restrict the president and other federal officials, whereas Article III and IV give Congress some powers.\textsuperscript{17}

Charles Pickney of South Carolina originally considered designating suspension as a legislative power with a time limit as in Britain. But the Convention rejected this formulation, deciding instead to limit it in terms of the conditions of rebellion, invasion, and public safety.\textsuperscript{18} At the Virginia Convention, John Randolph averred that the power rested with Congress as part of its authority in regulating the judiciary. Some critics have since argued that this assumption begs the question and is contrary to the principles of enumerated powers, that Congress has no plenary power to regulate the courts, only to decide on the number of them and the appellate jurisdiction of the Supreme Court. Furthermore, because suspension does not only restrict the power to issue writs but goes to the privilege itself, this power is likely beyond Congress’s authority to regulate judicial processes.\textsuperscript{19}

THE POWER TO ISSUE THE WRIT

Perhaps the greatest curiosity concerns the judicial body that has the power to issue writs in the first place. Most likely, the Suspension Clause was written to protect not the federal judiciary, but the state courts. This answer shocks modern Americans, although it flows logically from the constitutional language and history immediately preceding the creation of the federal government. The colonies adopted habeas corpus. The states that they became carried the torch. Then, the Constitution was ratified.

In the early American Republic, cases involving federal subject matter – questions that turned on the powers of the federal government and principles of the federal constitution – typically went through the state court system. The status of the American states as free and independent before the adoption of the Constitution,

\textsuperscript{14} Mian, \textit{American Habeas Corpus}, 150.
\textsuperscript{15} Mian, \textit{American Habeas Corpus}, 139–40.
\textsuperscript{17} Sidney Fisher, 463.
\textsuperscript{18} Sidney Fisher, 462–3.
\textsuperscript{19} Sidney Fisher, 466–7, 469.
and the American understanding of habeas corpus as a common law right merely acknowledged, not created, by state statutes and constitutions, suggest that it was understood at the birth of the American nation that state courts had the power to review federal detentions—a radical states’ rights power and institutionally diffuse check on federal authority.

After many years of legal and political transformation that has reshaped the meaning of federalism in the United States, it has become a common assumption that the Framers intended the Suspension Clause to protect the power of federal courts to test the validity of federal detentions. Ever since *Ex parte Bollman*, the common assumption has been “that the clause imposed an obligation on Congress to provide for the writ; that the clause itself guaranteed federal habeas; that the clause created a privilege; and that the clause directed the judiciary to make the writ routinely available.”

The Constitution does not actually grant any federal entity with the power to issue the writ. Habeas is not mentioned in Section 8 of Article I, which spells out the powers of Congress, but rather in Section 9, which enumerates restrictions. One could argue that the Suspension Clause not only implicitly gives Congress the power to suspend the privilege of the writ in the first place, but a power to the federal judiciary to grant such writs. However, this would seem a stretch, entailing a doubly implicit grant of power to the judiciary whose language is in the part of the Constitution primarily concerning the legislative body.

Another problem with assuming the Article III federal court system possesses the habeas power protected by the Suspension Clause is that the Constitution itself only necessarily creates one court—the Supreme Court. The lower federal courts are not established by the Constitution, but rather by acts of Congress. The Constitution gives to Congress the power to “constitute tribunals inferior to the Supreme Court” and presumably some power to regulate them.

In 1789, the Congress created the federal court system through the Judiciary Act, which set the boundaries of jurisdiction, including relating to writs, for the Supreme Court and lower federal courts. The first section granted individual judges and justices with habeas powers. The second section granted original habeas jurisdiction to the district courts. The circuit courts also had this jurisdiction, but lacked appellate review power over the district court habeas decisions. This original jurisdiction was limited. Federal habeas under the Judiciary Act did not, for example, extend to people imprisoned after conviction by competent tribunals, or to people jailed except under authority of the U.S. federal government.

Yet under the Constitution itself, habeas corpus appears as a privilege that can only be limited under specific circumstances. If, at the time of the Constitution’s

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20 Duker, 126.
23 Judiciary Act, 1789.
24 Church, 58–9, 65.
adoption, no lower federal courts existed to issue habeas corpus writs, which courts were empowered to do so? Not the Supreme Court, which was born with limited reach in its original jurisdiction – that is, to areas where questions of federal law would arrive originally in the Supreme Court. Beyond that, it was primarily a court of appellate jurisdiction – a court that held controversies that first appeared before the lower court system.

Thus, insofar as the Constitution vested habeas corpus in the federal court system, it could pertain to cases only where the Supreme Court had constitutionally granted original jurisdiction, which involves a narrow set of cases – those concerning ambassadors, public ministers, consuls, and disputes to which a state government is a party. Even upon gaining appellate jurisdiction over the lower federal courts, the Supreme Court still had no original habeas corpus jurisdiction under the Judiciary Act. So its only habeas corpus jurisdiction logically involved detentions under the command of the lower federal courts.

Justice John Marshall later affirmed that original jurisdiction went to the lower courts and the Supreme Court had appellate jurisdiction.

Although the Congress quickly created the lower courts with the Judiciary Act, their creation is not a foregone conclusion under the original Constitution. So which courts did have the power, taken for granted in the Suspension Clause, to issue writs of habeas corpus? “It is most likely,” writes William Duker, “that the framers of the Constitution intended the habeas clause to restrict Congress from suspending state habeas for federal prisoners.” This interpretation gains reinforcement from the fact that the Suspension Clause appears in Article I, Section 9, which primarily concerns the limits of the federal legislature’s powers as they relate to the powers of the states. In practice, up until the Civil War, most federal habeas corpus writs emanated from state, rather than federal, courts.

Whereas habeas corpus in England had begun as a power of higher courts over custodial officials of lower authority, the early American version, consistent with the language of the Constitution, was a lower court power over the central state’s detention authority. After the American Revolution, the American colonists feared that a newly created central government would usurp the rights and powers of the independent states. The decentralist attitude was most embraced by the Anti-Federalists, but even the framers of the centralizing Constitution recognized the fears of the states when they acceded to a Bill of Rights, reinforcing the limits of federal power and explicitly reserving to the states in the Tenth Amendment all powers not expressly granted to the U.S. government by the Constitution.

25 Ex parte Yerger, 8 Wall., 85.
26 Duker, 127–8.
27 Mian, American Habeas Corpus, 177.
28 Duker, 8.
No comparable popular fear of the abuse of state habeas corpus for state prisoners existed. The federal courts had no authority at the birth of the Republic to question the validity of state detentions. States could suspend habeas, as Massachusetts had done during Shays’s Rebellion in 1787. Their suspensions were limited in some cases by their own constitutions, and in all cases by a traditional understanding that only extreme cases would warrant suspension.

If federal courts had habeas authority over federal detainees, so did state courts, which also had exclusive authority over state habeas cases. Because the states had habeas power by virtue of common law, statute, or state constitutional guarantees, the main fear concerned the federal government’s potential suspension of this power of the state courts. Therefore, scholars must see the Suspension Clause in the context of habeas corpus protections against federal detentions.

Some have argued that without the Suspension Clause, the federal courts would not have any habeas jurisdiction, which was only clarified, but not created, by statutes such as the Judiciary Acts of 1789 and 1801. But even if the federal judiciary had the habeas corpus power independent of any statutes, it is still more than likely that such power is also independent of the Suspension Clause, which therefore does not protect the Great Writ any more than it endangers it.

American habeas corpus jurisdiction, Mian has argued, comes from the common law, not from statute. Habeas was practiced as part of the fabric of Anglo-American law, and long established in use by the colonial courts. In England, it was first established not through statute, but simply through use by the Courts of Chancery and King’s Bench. The Courts of Common Pleas and Exchequer did get their powers by statute, but had English common law been less rigid, they too could have adopted the powers on their own. Because Article III of the Constitution empowers the courts in “all cases in law and equity” – rather than, as the rejected language had said, “under laws passed by the legislature” – the basic structure of common law, including the central role of habeas corpus, automatically binds the Constitution. Mian argues that the Constitution only gives Congress the power to define the judiciary’s jurisdiction in areas where statute creates the jurisdiction. Habeas corpus, however, is an “inherent” power of the judiciary. The power to issue the writ “especially in regard to the powers of the Supreme Court, is indispensable to the administration of federal justice. . . . Without such powers the Supreme Court of the United States cannot comply with its essential constitutional responsibilities.” For its supremacy and first duty in defending due process, it automatically has habeas corpus jurisdiction. The validity of the common law as a foundational basis was further recognized in Section 34 of the Judiciary Act.

In any event, the Suspension Clause is most likely not the source of any federal judiciary’s habeas powers, whether they are implied by the Constitution’s language

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30 Duker, 129.
on common law or not. Either the federal judiciary has habeas authority by nature of the common law, or it does not, but the authority is not an enumerated constitutional power. If we see the Suspension Clause and the adoption of the Constitution not as steps toward guaranteeing a right of habeas corpus on a national scale, but rather as an implicit grant to the U.S. government of the power to suspend, albeit under limited circumstances, a common law power that the state courts had already enjoyed—and perhaps a common law power, however restrained, that the federal judiciary possessed by nature of its common law powers independent of the Suspension Clause—we can see why many early Americans would have preferred that the Constitution simply not mention the writ at all. Or, if the Constitution was going to mention habeas, that it simply bar the federal government from interfering in any way, rather than giving that government a new power to take away a privilege assumed already to exist. From whatever authority, and whether we are focusing on state courts or federal courts, the Suspension Clause did not inaugurate a new protection of habeas corpus, but rather a new power to suspend it.

The Suspension Clause controversy appeared at the January 1788 Massachusetts convention that deliberated upon ratifying the Constitution. General Thompson called the provision a “consistent piece of inconsistency.” Adams assured the concerned delegates that states could still suspend state habeas corpus on their own authority. Taylor wanted a limit on suspension powers, whereas Judge Dana argued that the feds could be better trusted on this than the states. North Carolina, South Carolina, and Georgia, states with a particularly strong habeas tradition, did not want the Constitution to authorize federal suspension whatsoever. South Carolina’s John Rutledge could not conceive of any reason to allow the federal government to suspend habeas under any circumstances. The “rebellion or invasion” requirement did not satisfy the dissenters. Luther Martin of Maryland summed up the objection:

As the State governments have a power of suspending the habeas corpus act in those cases, it was said, there could be no reason for giving such a power to the general government, since, whenever the State which is invaded, or in which an insurrection takes place, finds its safety requires it, it will make use of that power—And it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be an act of rebellion, and suspending the habeas corpus act, may seize upon the persons of those advocates of freedom, who have had virtue and resolution enough to excite the opposition, and may imprison them during its pleasure in the remotest part of the union, so that a citizen of Georgia might be bastiled in the furthest part of New-Hampshire; or a citizen of

33 Mian, American Habeas Corpus, 106–7.
34 Duker, 128, 130; Oaks, 248.
New-Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connexion.\textsuperscript{35}

Martin told his state of Maryland that he wanted to reject the Constitution over the Suspension Clause. His efforts failed, and the new centralizing Constitution passed over his wishes and the dissent of the Anti-Federalists.

\textbf{THE RISE OF AMERICAN MILITARY LAW}

Meanwhile, the United States had already begun adopting a set of standards for military law. The history of American military law and the history of habeas corpus for federal prisoners have intertwined with one another to this day. Military law and martial law involve the military authority exercising power, including judicial power, over a given jurisdiction, usually in the wake of a publicly defined emergency. Because this authority generally displaces the civilian judiciary’s authority, military or martial law often occasions the weakening of traditional due process protections, including habeas corpus. Although suspension of habeas and the imposition of military law are not synonymous, and one can occur without the other, they often arise in tandem, particularly when military law extends not only to members of the armed forces but also to the general public.

In 1775, the Continental Congress adopted the Articles of War to set guidelines for military law in the American Revolution. It drew on a tradition of military law going back to the codes of war created by Richard I in 1190 and Richard II in 1385; the Articles of War in Sweden adopted by King Gustavus Adolphus in 1621, and a tradition of military trials starting with England’s creation of the court-martial in 1686. The 1749 version of Britain’s Articles of War did not allow for executive discretion. In 1757, new amendments established some protections for prisoners of war.

The Continental Congress established rules for the military, strictly codifying many rules but trusting George Washington with discretion. Washington used courts-martial against deserters during the Revolution. Some colonies also instituted courts-martial, along with Articles of War. Such tribunals were an exception to the rules of a jury trial, but only applied to soldiers. Later, Congress also set rules for mutiny, sedition, insubordination, desertion, and assistance to the enemy – all of which were tried by court-martial.

Washington was adamant to have the rules read to his soldiers. On New Year’s Day 1777, he prohibited soldiers from “plundering any person whatsoever, whether Tories or others.” He did not always use military law against traitors. When Samuel Carter of New Jersey was accused of taking arms to the enemy, Washington said he should not be court-martialed, but rather sent to a civil authority. On the other

\textsuperscript{35} Luther Martin, General Information 1788 Storing 2.4.72; http://press-pubs.uchicago.edu/founders/documents/a1.9.289.html.
hand, Benedict Arnold’s correspondent and collaborator, John André, was denied the protections of a prisoner of war because he wore civilian clothing – traditionally, belligerents in war faced punishment for eschewing the appropriate regalia. This “disguised habit,” as Washington put it, doomed André to a trial by a board of officers, which sentenced him to death and had him hanged.

In practice, the civilian power did not consistently govern military law. In 1786, Major John P. Wylls’s order of an execution without congressional approval became exposed. His order lacked legal propriety, but the realities of war and the limitations of time and communication prompted the major to act extralegally. (Of course, in today’s era of instantaneous communication this would not be as much of an excuse.)

The Declaration of Independence decried the idea of military commissions beyond civilian authority. The Articles of Confederation also emphasized the supremacy of the legislative power over military law. Under the U.S. Constitution, Congress has power to “make rules for the Government and Regulation of the land and naval Forces” and to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”

Just as Jefferson and others assumed Congress possessed the authority to suspend habeas corpus, most also saw Congress in charge of military law. The executive branch has the power to repel sudden attacks, but it cannot wage war on its own, and the Constitution puts the laws of war under the auspices of Congress.

After the ascent of the Constitution, Congress established a policy for captures, seizures, prizes, reprisals, ships, and commandeered loot, giving the Court of Appeals judicial authority over them. In 1790, Congress defined crimes against the United States as crimes against nations. The Articles of War established the authority for martial law. In 1805, a set of new laws designated harsh penalties for questionable offenses in the military, over the protests of John Quincy. Only two-thirds of a tribunal was needed to mete out the death penalty, and spies would be executed.36

The first important Supreme Court habeas decisions involved cases of alleged treason. In 1795, the Supreme Court granted habeas relief to a man accused of treason for his leadership role in the Whiskey Rebellion.37 In the next decade, when President Thomas Jefferson became convinced that his vice president, Aaron Burr, was conspiring to found an independent nation out of land acquired from Mexico and perhaps the newly obtained Louisiana Territory, he ordered the arrest of Burr and several of his conspirators. The judicial system, including John Marshall’s Supreme Court, found insufficient evidence to try Burr for treason. In response to Marshall’s request for documentary evidence, Jefferson asserted executive privilege, but Marshall ruled that the president was not above the court’s subpoena power.

Along with his flirtations with the potentially tyrannical power of executive privilege, Jefferson also abandoned his devotion to habeas corpus.

During the Constitutional Convention, Jefferson had vehemently opposed allowing any exception to the prohibition of suspending habeas corpus. “Why suspend the Hab. corp. in insurrections and rebellions?,” he wrote.

The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages.38

But just like the Parliamentarians of England who favored habeas until it became an inconvenience to their own priorities – just like the colonial revolutionaries waving the banner of liberty only to suspend habeas corpus during the American Revolution – Jefferson, once in power and facing what he considered a sufficient excuse, urged Congress to suspend habeas corpus in 1807.

A bill went to the House that would have suspended habeas corpus for three months. As in Britain, this suspension would have created a new class of offenses to which habeas did not apply, with a time limit, and without disrupting common law habeas corpus. In open deliberation, House members argued that public safety did not require suspension, which carried the risk of replacing military law for civilian law. One member likened the proposal to the “establishment of the first dictatorship of Rome.”39

Representative Burwell also spoke against Jefferson’s proposed suspension, echoing the sentiments of Jefferson himself from the days of the Constitutional Convention:

With regard to those persons who may be implicated in the conspiracy, if the writ of habeas corpus be not suspended, what will be the consequence? When apprehended, they will be brought before a court of justice, who will decide whether there is any evidence that will justify their commitment for farther prosecution. From the communication of the Executive, it appeared there was sufficient evidence to authorize the commitment. Several months would elapse before their final trial, which would give time to collect evidence, and if this shall be sufficient, they will not fail to receive the punishment merited by their crimes, and inflicted by the laws of their country.40

Jefferson’s attempt to suspend habeas corpus garnered support in the Senate but failed in the House of Representatives. A resolution to provide penalties for judicial or executive obstruction of habeas corpus also failed to get anywhere.41

41 Mian, American Habeas Corpus, 115, 118.
Meanwhile, the Supreme Court deliberated on Ex parte Bollman, concerning two alleged conspirators, Erick Bollman and Stuart Swartwout, in the Aaron Burr controversy. The territorial governor of New Orleans had them detained, and the New Orleans Supreme Court’s writ, as well as a federal district court writ, went ignored. The case concerned several key questions on habeas corpus jurisdiction.

The attorney general did not file a brief. Bollman’s lawyer, Harper, argued that common law and the Court’s constitutional functions empowered the Court to issue the writ. “Every court possesses necessarily certain incidental powers as a court,” he argued. “This is proved by every day’s practice. If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage. It could not enforce obedience to its immediate orders. It could not imprison for contempt in its presence. It could not compel the attendance of a witness, nor oblige him to testify.”

According to Harper, just as English courts obtained habeas power through practice, rather than through statute, so too did the Supreme Court require no statute to issue the writ. “Have not the [American] people as good a right as those of England to the aid of a high and responsible court for the protection of their persons? Is our situation less advantageous in this respect than that of the English people?”

Further, he argued that the Judiciary Act, in any event, gave habeas corpus power to the Supreme Court, and any ambiguity as to whether the Court or only individual judges possess the power is moot: “It cannot be presumed that congress meant to give each judge singly a power which it denied to the whole court. That it confided more in the individual members of the court, than in the court itself.”

Next, Bollman’s counsel addressed the question as to whether the Supreme Court had habeas jurisdiction over a detention undertaken under the authority of the District of Columbia’s Circuit Court. Perhaps attempting to appeal to the High Court’s sense of superiority and with a hint of nostalgia for habeas as a centralizing judicial instrument in English history, Harper presented an entertaining argument:

Is it not manifest that [restricting Supreme Court habeas review over lower federal courts] would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know that congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible, and duties so unimportant or so odious, as necessarily and certainly to exclude every man of character, talents and respectability of every party? Will not such courts, therefore, be necessary filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of

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42 Wert, Habeas Corpus in America, 40.
43 8 U.S. 75, 79 (1807), Harper, for Bollman.
44 8 U.S. 75, 90–2, Harper, for Bollman.
45 8 U.S. 75, 84, Harper, for Bollman.
those in power for the moment? Can any thing like independence or integrity be expected from such judges? . . .

Let it be now declared that there resides in this high tribunal (as respectable as our constitution can make it, and as independent as the nature of our government permits) a power to protect the liberty of the citizen, by the writ of habeas corpus, against the enterprizes of inferior courts, which may be constituted for the purposes of oppression or revenge, and you place one barrier more round our safety. What stubborn maxim of law, what binding authority requires the admission of a principle so repugnant to all our feelings and to the spirit of the constitution? On what ground or reason of law can it be pretended that a commitment by the circuit court stops the course of the writ of habeas corpus?

Harper cited Burford’s Case from 1795, when habeas was issued, calling on the Court to respect stare decisis – judicial precedent – when “in favour of liberty.”

Speaking for the Court majority, Chief Justice Marshall handed down one of the most important rulings in habeas history. The decision argued that common law defines the meaning of habeas, but denies that the Court’s habeas jurisdiction originates in the common law. If not for the Judiciary Act, the federal court system would have no habeas power:

[T]his court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning

Harper continued: “Will they not act continually under the influence, not merely of their own party passions and prejudices, but of hope and of fear, those great perverters of the human mind? The precedent is already set that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of habeas corpus, is to shut the mouth of the supreme court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. Does the history of the human passions warrant the conclusion, or the expectation, that such an engine will not be used? We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance. We too are men of like passions, and it behoves us, ere we have reached these fatal extremes, to provide, as far as the imperfection of human nature will permit, against the dangers which have assailed others, and which threaten us. The best mode of making this provision, is to establish salutary maxims in quiet times, and to adhere to them steadily.” 8 U.S. 75, 89–91.

8 U.S. 75, 93.
from the bar, in relation to it, may be answered by the single observation, that for
the meaning of the term habeas corpus, resort may unquestionably be had to the
common law; but the power to award the writ by any of the courts of the United
States, must be given by written law.\textsuperscript{48}

In addressing Harper’s argument on the power being vested in the Court, not just
the individual judges, Marshall responded:

There is certainly much force in this argument, and it receives additional strength
from the consideration, that if the power be denied to this court, it is denied to
every other court of the United States; the right to grant this important writ is given,
in this sentence, to every judge of the circuit, or district court, but can neither be
exercised by the circuit nor district court. It would be strange if the judge, sitting
on the bench, should be unable to hear a motion for this writ where it might be
openly made, and openly discussed, and might yet retire to his chamber, and in
private receive and decide upon the motion.\textsuperscript{49}

While statute gave the Court its jurisdiction, Marshall found it worthwhile to exam-
ine English common law history to determine the nature of the Court’s writ. He
explored the different kinds of habeas corpus from English law and concluded by
elimination that Congress had meant to empower the Court with the power to
issue writs of \textit{habeas corpus ad subiciendum} – rather than \textit{ad respondendum, satisfi-
ciendum, prosequendum, testificandum, deliberandum, faciendum, ad recipiendum}
or \textit{cum causa}.\textsuperscript{50}

Ultimately, Marshall concluded that the Supreme Court does indeed have the
power, under congressional designation, to issue the writ of habeas corpus, and
that because Congress had not successfully and constitutionally suspended habeas,
Marshall would issue the writ.\textsuperscript{51}

The dissenting opinion by J. Johnson argued, in contrast, that the Court had
no such right to issue the writ, any more than it had the power to issue a writ of
mandamus to an executive officer – a power ruled unconstitutional in Marshall’s
watershed decision \textit{Marbury v. Madison}.\textsuperscript{52}

This speaks to a fascinating irony. Just as Marshall had, in that landmark 1803
case, simultaneously denied any powers not expressly given to him by law (including
the mandamus power) while ushering in the modern era of judicial review by claiming
the Supreme Court had the right to strike down unconstitutional laws, here too he
sided with a strict reading of the law while claiming a certain supremacy not before
established. In refusing to issue the writ of mandamus in 1803, he had seemingly
agreed with the Jeffersonians who saw the writ as a power grab, while on balance

\textsuperscript{48} 8 U.S. 75, 96.
\textsuperscript{49} 8 U.S. 75, 96.
\textsuperscript{50} Notably the Court had to determine this – it was not explicit.
\textsuperscript{51} 8 U.S. 75, 101.
\textsuperscript{52} 5 U.S. (1 Cranch) 137 (1803).
outraging them by claiming the powers of judicial review. Perhaps Bollman too was a political decision.53

By issuing the writ of habeas corpus in 1807, Marshall not only challenged the executive power to detain people without due process under the Jefferson administration; he also asserted the limits of his habeas corpus powers as emanating not from the common law – as Americans had understood it for generations – but rather from the words written in the Constitution and the laws passed by Congress. Bollman was monumental in determining the extensive range of federal habeas, although it did not allow for much room for federal oversight of state prisoners, an issue that with a few exceptions did not become relevant until after the Civil War.

The Court ruled that only Congress could suspend habeas corpus, and appeared firmly opposed to executive usurpations of judicial powers, especially without proper congressional authorization. But how long would that last? How long would it be before the executive found ways to circumvent the Great Writ in the fledgling American nation?

As the early nineteenth century unfolded, the tension between the new national authority over habeas corpus and the power of the states became clearer. Habeas compromised the goals of the national government, which increasingly strove to have more and more power over the practice of the writ. From the ratification all the way through the antebellum era, the radical nature of American habeas corpus as a decentralized check on federal detention power persisted with moments of glory. The American view that martial law was inappropriate except as it concerned members of the armed forces lived on. Use of the military in domestic law enforcement was regarded as subservient to the civil authority, as it had been even in such heated conflicts as Shays’s Rebellion, the Whiskey Rebellion, and Fries’s Rebellion. Jefferson had used the military to address the Aaron Burr conspiracy, but the Court ultimately constrained his actions through habeas.54

In 1811, Congress passed the Enabling Act to authorize the formation of a state government in the Louisiana Territory and to admit the forthcoming state into the Union. The Act affirmed habeas corpus. One year later, the U.S. government was at war with Britain. Partly over legitimate grievances – the British had been impressing American merchants into the Royal Navy – and partly as an expansionist attempt to conquer Canada,55 the United States found itself in the middle of a second war with its recent motherland.

With the aforementioned military law taking shape, the U.S. government waged the War of 1812 in ways that tested the constitutional habeas corpus regime, which had

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53 Duker notes that in the 1822 case Ex parte Kearney, which shared some similarities, the defendant was remanded (Duker, 229).
entrusted the national government with protecting the writ. There was a backlash. In 1814, court-martial procedures were amended after public concerns that they had violated civil liberties.

As British forces approached Louisiana, suspension was considered. General Andrew Jackson imposed martial law throughout the state and in New Orleans on December 15, 1814, which was also the twenty-three-year-anniversary of the ratification of the Bill of Rights. People were ordered to report to a government office, lest they face arrest and detention. No one could leave without written permission from Jackson or his staff. People who violated the 9:00 P.M. curfew would be apprehended as spies. Even after Jackson defeated the British at the Battle of New Orleans, even while peace terms were being negotiated at Ghent, the martial law persisted.

Louis Louaillier, a U.S. citizen, journalist, and assembly member, wrote in his local newspaper, *The Louisiana Courier*, that detainees should go to a civil judge and decried Jackson’s policy as “no longer compatible with our dignity and our oath of making the Constitution respected.” Jackson ordered Louaillier’s arrest. Upon his arrest on March 5, 1815, Louaillier’s lawyers petitioned District Judge Dominick Augustin Hall for a writ of habeas corpus. The judge ordered the journalist freed. In response, Jackson imprisoned the judge, pursued the clerk, and jailed the sheriff for executing the order. Jackson handed down a decree: “should any person attempt by serving a writ of Habeas corpus” he would be arrested.

The judge found himself in the same barracks as Louaillier and languished behind bars until the news of the peace treaty came to Jackson. Even after a court-martial acquitted Louaillier, Jackson kept him detained. On March 12, troops marched Hall outside of New Orleans. Andrew Jackson defended his martial law, rhetorically asking, “Is it wise, in such a moment, to sacrifice the spirit of the laws to the letter, and by adhering too strictly to the letter, lose the substance forever, in order that we may, for an instant, preserve the shadow?”

Jackson was fined a thousand dollars for contempt of court (and thirty years later Congress refunded the money to him!). In 1815, acting Secretary of War Alexander J. Dallas wrote two letters refusing to legitimize Jackson’s use of martial law. But there existed no sufficient legal penalty for what Jackson had done and no way to stop officials with such authority from violating habeas corpus. Armed with Jackson’s precedent of martial law and suspension, authorities had a convenient way to circumvent the force of habeas corpus.

In the aftermath of the War of 1812, the precedents of military law lived on. In February 1818, Jackson convened a special court to try Alexander Arbuthnot and Robert Christy Ambrister for aiding the Creek Indians in their war against the United States. Ambrister was sentenced to fifty lashings and hard labor. Jackson ordered this sentence overridden and had Ambrister shot. The House Committee on Military

57 Wyzanski, 105; Fisher, 26–8.
Affairs protested, saying Jackson had no authority under the law to do this and that hearsay evidence and other deficiencies poisoned the trial. Arbuthnot was found not guilty of spying. The House as a body overwhelmingly endorsed Jackson’s trials and extralegal execution.\(^{59}\)

Until around 1830, the American conception tended to see military law and martial law as roughly synonymous, if not identical. Some theorists began drawing distinctions, but as late as 1833 Supreme Court Associate Justice Joseph Story used the terms interchangeably. Martial law was generally regarded as a limited imposition that did not necessarily trigger suspension of the writ. This understanding eventually gave way to a broader conception of martial law as a condition affecting the public at large and with wider implications for the maintenance of order, because of a number of American experiments with militarized policing culminating in the Civil War.\(^ {60}\)

In 1841, Thomas Wilson Dorr spearheaded an effort to adopt a new constitution in Rhode Island to enfranchise all white men. After two separate elections resulted in Dorr’s election along with the reelection of Governor Samuel Ward King, King responded to the burgeoning challenge to his authority by declaring martial law. President John Tyler chose not to send U.S. troops, but used his authority to back the state militia’s enforcement of martial law throughout the state. Martin Luther, a participant in the Dorr Rebellion who had been arrested and had his property searched, eventually took his case to the Supreme Court. In 1849, Justice Roger Taney, speaking for the Court, upheld the federal government’s actions:

The President of the United States is vested with certain power by an act of Congress, and in this case, he exercised that power by recognizing the charter government.

Although no State could establish a permanent military government, yet it may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The State must determine for itself what degree of force the crisis demands.

After martial law was declared, an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, or order a house to be forcibly entered. But no more force can be used than is necessary to accomplish the object, and if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.\(^ {61}\)

The Mexican-American War saw the first U.S. military commissions on foreign soil. On February 19, 1847, General Winfield Scott ordered martial law in Tampico. It governed civilians and U.S. troops, holding them to a military tribunal system ultimately overseen by Congress but without the niceties of civil law. American

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\(^ {60}\) Dennison, 52–3, 66.

soldiers who committed crimes like rape were shot. Under these tribunals, 117 were convicted, mostly Americans. In September, changes designated normal crimes – rape, theft, assault – to the civil court system.  

A LIMITED REMEDY

In 1830, the Supreme Court handed down the decision *Ex parte Watkins*, affirming that criminal conviction upheld by a lower federal court was generally a sufficient cause of detention. This decision, written by Chief Justice John Marshall, relied on the principle of finality, that a higher court should not question the authority of a lower court in criminal matters – somewhat at odds with the centralizing mechanics of habeas corpus in England, but consistent with the American construction of the writ. It also established that federal habeas corpus for federal detainees was a narrow remedy. Convicts had very limited capacity to question their detention under federal habeas corpus, a policy that remained for the better part of the century.

As habeas corpus had arisen mostly as a remedy for pre-trial detention – jail – it did not, at first, broadly apply as a post-conviction remedy. Not only was this true on the federal level; most states prevented the writ’s use as a post-conviction remedy. In the next two centuries, this changed dramatically. Federal habeas corpus eventually became a last resort for those convicted and sentenced, often to death, and lost its traditional function to free someone from jail, often only after a few days, to ensure the legality of his or her detention before trial. Today habeas has multiple functions, but it is primarily a remedy for those who have been determined guilty by the state. Pre-trial detention in jail is no longer the typical focus for habeas relief.

The experience of the early United States is consistent with habeas corpus’s history as a story of judicial muscle flexing, wherein actual liberation is far more anomalous than is often assumed. Before the American Revolution, habeas corpus showed promise as an anti-authoritarian mechanism as adopted in the colonies from the ground up. Its centralization in the American Constitution opened the door to future suspensions and usurpations by the federal government. Although in *Ex parte Bollman* the Court challenged federal detention and identified Congress as holding the power to suspend the writ, this resulted in part from political dynamics without much of a lasting impact on future executive detentions. In addition, the federal judiciary was unable to bring relief not only to state detainees, but to federal convicts as well.

Meanwhile, most of the excitement erupted in the state courts, the inheritors of the habeas power from their own colonial origins. Unfortunately, here too the nature of habeas as a mechanism of power was clearly on display. The writ would be used

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63 28 U.S. 193 (1830).
64 Wert, *Habeas Corpus in America*, 51.
in service of liberty, but also in service of its precise opposite. The states proved to be inconsistent venues for the writ as a tool of freedom. But the federal government was no more reliable, and as the statutory and judicial trends of centralization took root, eventually erasing the last vestiges of habeas’s decentralist Americanization, the antebellum federal government ended up siding decisively in favor of the very institution that was causing controversy in state habeas deliberations: chattel slavery.
And no power is more clearly conferred by the Constitution and laws of the United States than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws.

– Supreme Court Justice Roger Taney

Antebellum America presents two important and related themes in habeas history: the writ’s role in both enforcing and obstructing slavery, and its function in the balance of power between states and the federal government. Habeas corpus’s use to prop up slavery was likely its most shameful utilization in history, and another reminder of the writ’s fundamental relationship to power. On the other hand, its use to liberate slaves is one of the most inspiring stories. Both examples demonstrate the importance of the greater social context, public ideology, and institutions in determining what purposes habeas serves. Despite the Constitution’s nationalization of habeas corpus, the states still had far more habeas authority over the federal government than the other way around. Today, federal habeas review over state convictions is seen as a civil libertarian process, although this dynamic was achieved first in the name of collecting tax revenue, and then, in practice, to enforce the Fugitive Slave Act and overturn state personal liberty laws. Long forgotten are state habeas review of federal detentions and its role in challenging federal slavery enforcement. The antebellum period ends with the Supreme Court undermining this most subversive use of the writ.

Habeas before the Civil War offers a perplexing paradox. Celebrated as a libertarian mechanism, habeas writs often issued to defend slavery, the exact reverse of liberty. The tendency of many states to serve this institution through habeas certainly compromises their legacy as a great protector of freedom. Yet state habeas corpus was also used to undercut slavery as well as to challenge federal military detentions. In contrast, the federal government, whose habeas review over state detentions many

today see as a constitutional inevitability and a human rights blessing, first moved in to promote not freedom so much as central authority in the form of its taxing power. The great habeas struggle between state and federal authority culminates in the former fighting for freedom and the latter siding with slavery.

ENSLAVEMENT AND LIBERATION

The connected issues of slavery and states rights eventually resolved in the Civil War, when slavery was abolished, federal power supplanted state authority, and habeas was completely restructured. Before the war, Southern states defended slavery as their right under the Constitution. Very few Americans, even among ardent abolitionists, believed the federal government had the constitutional authority to ban slavery where it already existed. Indeed, notable abolitionists saw the federal government as complicit in protecting the slave power, allowing for slavery in the territories, enforcing the Fugitive Slave Clause that had plagued the original Constitution and was later codified and strengthened in the Compromise of 1850, and protecting slavery right at the heart of the United States capital. For these reasons, radical abolitionists often championed secession and disunion as an anti-slavery measure.²

There is good reason to believe that slavery required governmental support, both at the state and federal levels, to sustain itself. It was economically unprofitable from a macro perspective – slaveowners got less value out of owning slaves than from free labor, once the costs of enforcing slavery and violently keeping slaves on plantations were taken into account. The socialization of these costs allowed slaveowners to make a tidy profit. State governments conscripted citizens into slave patrols to make sure slaves did not escape. On the national level, the Fugitive Slave Act of 1793 required the extradition of escaped slaves in the North. The slaveocracy regarded the federal Fugitive Slave Act as crucial and lobbied for its continuation and active enforcement. Because of this federal protection, the Underground Railroad, which smuggled slaves to freedom, had to extend all the way to Canada.³

Habeas corpus was used in both the North and South, both to liberate slaves and alleged slaves and as a tool by slaveowners to recapture runaways. It was also used to arbitrate between conflicting claims to title in a slave.⁴ This complexity renders any simple analysis of the Great Writ in the antebellum years impossible.

In the North, habeas corpus occasionally freed slaves or blocked their return to the South.⁵ This practice had some parallels in English history.⁶

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² See William Lloyd Garrison, “The American Union,” The Liberator, January 10, 1845, where Garrison concludes, “Henceforth, the watchword of every uncompromising abolitionist, of every friend of God and liberty, must be, both in a religious and political sense – ‘No union with slaveholders!’ ”
⁴ Wert, Habeas Corpus in America, 53.
⁵ Oaks, “Habeas Corpus in the States,” 278.
experience, alleged slaves sometimes won their freedom in the absence of compelling evidence against them. In 1789, a man kidnapped a young free African-American woman, citing the darkness of her skin as *prima facie* evidence of her slave status. The New Jersey court disagreed and issued a writ to free her. The next year a would-be master demanded a jury trial to decide whether he should lose his “property.” The New Jersey court concluded that “this is not directly a case of property – it is one of personal liberty . . . [Habeas corpus is] intended for the protection of individuals against arbitrary or illegal detentions.” The state made habeas corpus available to “negro, mulatto, mestee, or Indian.” Masters could still retrieve their “rightfully” owned slaves, but some states extended habeas protections to slaves too.

During this period, habeas served as a limited tool for recognizing manumission, usually only if it could be shown that the manumission had been legal under the will of the proper “owner.” In 1790, the Supreme Court of New Jersey issued a habeas corpus writ to inquire into the slave status of a mother and son. It ordered the son freed and the mother freed after her term was up. Also in 1790, the New Jersey court ordered a slave freed on the basis of the verbal wishes of his former master.

In the early antebellum era, however, the Northern courts also used habeas corpus to cooperate with the South to recapture slaves. In 1828, New York revised its habeas corpus act to allow any master whose slave escaped to New York to apply for a writ in any state court that would issue it to apprehend his “property.” In 1834, a New York court allowed a writ of habeas corpus to apprehend an escaped slave and send him back to Louisiana.

Meanwhile, in the South, slaves’ habeas corpus rights were subordinate to the property rights of their “owners.” The black petitioner had to overcome the racially based presumption of slave status. In 1806, a Virginia court declared in *Hudgins v. Wrights* that

> in the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right of freedom, but in this case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to show that he is a slave.

Black Americans deemed free men did have habeas corpus access in Southern courts. But those claiming false returns lacked any statutory benefits or protections.

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8. 1 N.J.L. 49 (1790).
13. 12 Wend. 311 (1834).
Regarded as property, the presumed slaves could not contradict the facts of their return. The South witnessed a trend of procedures more favorable toward slaveowners. A Mississippi court ruled in 1845 that the jury trial, not habeas corpus, was the proper way to free alleged slaves. Along similar lines, an Alabama court ruled in 1853 in *Field v. Walker* that slaveowners had a right to a jury trial before a slave could be taken from them. “If he can be deprived of the right of trial by jury in respect of the legal claim to his slave, the same principle might deprive the citizen of jury trial in respect to all property.” A year later, the Kentucky Court of Appeals followed suit in *Weddington v. Sam Sloan (of color)*, upholding the power of the master to recapture slaves discharged through habeas corpus: “The writ of habeas corpus is not an appropriate proceeding for the trial of the right to freedom. The decision of the judge or justice, upon return of the writ, may operate to discharge a person held in slavery . . . but it does not establish his right to freedom.” This trend was not confined to the South. In 1840, four Northern states had statutes guaranteeing a jury trial for habeas corpus cases involving slavery.

Slavery’s defenders sometimes decried habeas corpus as a “fiat” method of depriving masters of their property. At times, a lower court’s habeas corpus writ to a slave was overturned. Slaves petitioning for their freedom did not benefit from res judicata—final judicial word, also called “claim preclusion.” In 1856, a Mississippi court held that habeas could only issue for a slave on the behalf of his original owner.

When slaves had other legal remedies theoretically available to them, courts often denied habeas relief. Slaves had to sue their masters for the false return. Some states designated skin color as proof of a slave’s status; in other states, freed blacks enjoyed stronger habeas corpus rights. Although Southern states upheld the rights of slaveowners, they were loath to do so when it interfered with the powers of the state. In an 1845 decision, *Ex parte Bell*, a Virginia court ruled that a master could not use habeas corpus to retrieve his slave from the state penitentiary. While the courts considered slaves the “property” of slaveowners, they could also be the seized “property” of the state.

Slaveowners also used habeas corpus to bring slaves back under their control. Mississippi guaranteed this peculiar habeas right by statute. In both North and South, habeas corpus operated to transfer slaves from one master to another, much the way repligando had moved serfs in medieval Europe. Although antiquated in England by the late eighteenth century, repligando still worked this way in Massachusetts,

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15. 13 Miss. 345 (1845).
17. 54 Ky. 147 (1854).
Maine, Mississippi, New York, Maryland, Pennsylvania, and South Carolina. Both
slaves and slaveowners used the arcane mechanism, the latter with increasing success
as jurors became more anti-slavery. Repligando – a suit in replevin – began falling
out of use because of legislative enactments and court decisions. In Pennsylvania and
New York, courts ruled that replevin did not apply to detainees imprisoned under
federal law. By the 1840s, slave cases rarely involved repligando. In a case concerning
Jamaican sailors imprisoned upon setting foot on American shore, federal circuit
judge in South Carolina threatened to apply repligando to slaves. The state supreme
court denied that this remedy was available.  

The interests of Southern slave states often clashed with the interests of non-slave
states. At first, courts tended toward deferring to the slave power, including when
slaves were the habeas petitioners. In 1814, a slave brought to Pennsylvania by South
Carolina Congressman Langdon Cheeves petitioned for a writ of habeas corpus,
believing that he was free under Pennsylvania law. The court ruled in the slave-
owner’s favor, citing a state law from before the ratification of the Constitution
that protected the slaveowning rights of congressmen: “[W]e all know that our
southern brethren are very jealous of their rights on the subject of slavery, and the
union . . . could never have been cemented, without yielding to their demands on this
point.” Eventually, Northern courts became more resistant to Southern demands
for returned slaves, and specifically protested habeas’s use to enforce slavery. In 1837,
a Connecticut court ruled that a slave brought to Georgia and left there was now
free under state law.

In the 1820s, Northern states began adopting personal liberty laws, which relied
largely on habeas corpus as a means of enforcement, assigning prosecutors the task
of defending alleged fugitive slaves in court and forcing slavemasters to post a bond,
some of which would be deducted as court costs and payment to the alleged fugitive
should he be shown not to be one. Pennsylvania adopted a law that made it illegal
to carry blacks for the purpose of enslavement. The Supreme Court found that
this conflicted with the 1793 Fugitive Slave Act and overruled the state law in 1842.
This decision, Prigg v. Pennsylvania, struck down habeas writs from free states that
undermined slavery, further nationalized the enforcement of the Fugitive Slave Act,
and foreshadowed the total national uniformity of such enforcement adopted in the
Compromise of 1850. Northern states responded by withdrawing their support from
recovering fugitive slaves.

In 1847, Pennsylvania designated all non-fugitive slaves to be free. Passmore
Williamson, a Philadelphia abolitionist, kidnapped three slaves belonging to U.S.

24 12 Conn. 38 (1837).
26 41 U.S. 539 (1842).
27 Oaks, 279.
minister to Nicaragua Colonel John Wheeler when he was porting his steamship on his way to New York City. Although not technically fugitives, the slaves were ordered back under Wheeler’s control after a writ of habeas corpus was issued by a federal circuit judge to Williamson. In this case, federal habeas corpus trumped states rights and thereby effectively protected a Southern slave interest.

The Great Emancipator himself, acting as a lawyer, found himself on both sides of habeas corpus slavery litigation. In an 1847 Illinois case, habeas corpus was used to bring slaves to jail and then later by anti-slavery activists to bring them to court. Young attorney Abraham Lincoln argued in court on behalf of the slaveowner – although he had also argued on the opposite side of a habeas slavery hearing not so long before.

The use of habeas corpus by both anti-slavery and pro-slavery forces characterized antebellum America all the way until the Civil War. Whereas it sometimes effectively secured the liberty of slaves and ex-slaves, it also shored up the slave power. “The south’s application of the writ,” writes Justin J. Wert from the University of Pennsylvania, was “crafted to reinforce ascriptive racial hierarchy’s and the south’s legal, political and economic interests in slavery as a way of life as well as their particular reading of states rights federalism.”

As to whether abolitionists thought the federal or state courts should wield the writ’s power, they argued for both, depending on the perceived success they believed they could garner at any particular time. Similarly, pro-slavery forces fought the habeas battle on both fronts, although their victory came in the federal enforcement of fugitive slave cases, resulted in the awkward use of habeas corpus both to free – and take freedom away from – slaves.

Although many associate the cause of abolition and protecting individual rights from repressive state institutions with the growth of federal activism in the nineteenth century and afterward, the trend was nearly the reverse in the antebellum era. “[A]lthough we see more federal involvement up to 1861, it is one that actually protects, if not fosters, the institution of slavery,” writes Wert. “[T]hese ‘liberty laws’ that employed habeas corpus as their primary legal mechanism for abolitionist and free-soil causes, were state-, not federal-level initiatives. Pro-slavery causes, primarily solidified after the Compromise of 1850 and its Fugitive Slave Act, were primarily federal-level initiatives.” In the name of enforcing slavery, nationalists willingly sided against habeas corpus as an instrument of liberty. President Franklin Pierce’s attorney general, a champion of the Compromise of 1850, declared that those arrested

28 United States ex rel. Wheeler v. Williams 28 F. Cas. 682 (1855).
29 Wert, Habeas Corpus in America, 27
“on a warrant of a competent judicial authority of the United States” did not have access to the writ.\textsuperscript{33}

HABEAS CORPUS AND STATES’ RIGHTS

Although habeas corpus in state court had a spotty legacy before the Civil War, the fact seems clear that state courts had such a power and served as the premier venue for the development of habeas corpus as a protector of individual rights. Pro-slavery activism at the federal level finally chipped away at the growing power of state habeas corpus as a revolutionary tool.

States statutorily expanded their own habeas corpus jurisdiction fairly uniformly across the country.\textsuperscript{34} This signified not just an advance in a due process protection, but the importance of state-level governance over federal power. Up until the mid-nineteenth century, “the well-settled rule applied by the courts and recognized by the commentators was that a state, as well as a federal, court had authority to issue a writ of habeas corpus to inquire into the imprisonment of a federal prisoner held within its jurisdiction.”\textsuperscript{35}

“Imprisonment” enjoyed a broad definition with radical implications. In 1836, the Supreme Court of Massachusetts successfully made the U.S. Navy discharge a minor and send him back to his guardian. “In the five decades preceding 1865 there are numerous instances where state courts issued their writ of habeas corpus to release persons from the restraints imposed on their liberty by the alleged wrongful conduct of federal officers.”\textsuperscript{36} In 1853, Attorney General Caleb Cushing considered it “definitely settled” that federal prisoners had recourse to habeas corpus in state court. This state review of federal detentions was limited to reviewing the constitutionality of the confinement to ensure the competency of the federal detention authority. Although limited, state-level habeas remained a palpable check.\textsuperscript{37}

The federal courts had the power to review federal detentions, and the state courts had the power to review both state and federal detentions. Over the course of the nineteenth century, this dynamic reversed: federal courts would obtain the power to review either federal or state detentions, and state courts would lose their power to check federal detentions. As of 1789, no U.S. court or judge had the power to use habeas corpus to bring forth a sentenced state prisoner, except as a witness.\textsuperscript{38} This changed over time, and the original motivation, as in much of the structural history of habeas, had less to do with the powerless individual’s interests against his state government and more to do with centralizing power.

\textsuperscript{33} Wert, \textit{Habeas Corpus in America}, 63.
\textsuperscript{34} Church, 1.
\textsuperscript{35} Duker, 149.
\textsuperscript{36} Oaks, 276, 288.
\textsuperscript{37} Duker, 149–50.
\textsuperscript{38} Church, 76.
In 1816 and 1817, New England states threatened to arrest federal officials who enforced federal law contrary to state law. In 1833, in protest against the Tariff of Abominations, South Carolina detained federal officials under the Nullification Acts. In response to state interference with federal law, Congress passed the Force Act, which stated:

> That either of the justices of the Supreme Court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.

Thus, federal authorities saw in habeas corpus a shield to protect their supremacy over lower authorities – exactly the rationale that had led to the development of habeas corpus in England.

Some habeas scholars see this first nationalization of antebellum habeas as a crucial move, even if intended not to vindicate the rights of completely powerless detainees, but rather to protect federal tax collectors. Progressive and liberal scholars tend to regard the integrity of federal supremacy, if not its tax system itself, as worthy of judicial protection. In practice, however, the Force Act did not protect the liberty even of tax collectors – but rather came to the rescue of an even less sympathetic class. Justin Wert writes:

> The 1833 act was never used to rescue tariff officers who were detained by recalcitrant states. Instead, it was used to rescue slave catchers who were arrested and held by state governments, further exacerbating tensions within the Jacksonian political regime.

In 1842, the federal government expanded its habeas authority over states in the name of protecting foreign citizens. Less than two decades earlier, the federal courts had been reluctant to issue writs even for foreign citizens, at least of the wrong color. In 1823, a federal court considered the case of a black Briton apprehended from a boat docked in Charleston harbor who faced being sold into slavery under South Carolina law. The court struck down the state law on commerce clause grounds, but did not issue a writ because the prisoner was being held under state authority. This soon changed. In 1838, a federal court indicted a British citizen for allegedly destroying a steamboat. New York authorities captured him when he entered the country from Canada. Britain wanted him freed; New York refused. To avoid war with Britain, Congress passed the Habeas Corpus Act of 1842 to provide the federal courts with

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39 Church, 76.
40 Duker, 187.
41 Hertz and Liebman, 49.
43 8 F. Cas. 493 (1823).
jurisdiction over foreign subjects detained under state authority. However, this Act, like the 1833 Force Act, was also not used as it was intended. The changes to habeas jurisdiction did not really come into effect until after the Civil War. These two reforms in habeas affect the way scholars have regarded the nationalization of habeas, but the intentions behind them were hardly humanitarian. Wert explains:

Both the 1833 and 1842 acts are often cited by contemporary critics in support of broader arguments about the inevitability of increased federal habeas court supervision of state criminal trials. But there is nothing in the history of these two acts that suggests that they were initiated for reasons other than the enforcement and maintenance of core regime principles of Jacksonian Democrats in the early 1830s and Whigs in the early 1840s.

Federal habeas corpus expanded its reach in response to state subordination of federal power, particularly the federal power to enforce slavery. The Compromise of 1850 solidified the Fugitive Slave law, creating exorbitant fines for those who assisted slaves in their escape, weakening due process rights for alleged runaways, stripping them of their right to a trial by jury and habeas corpus. In the 1850s, when states began prosecuting federal marshals enforcing the Fugitive Slave Act, the federal judiciary interpreted Congress’s Act of 1833 as a grant to review the cases of convicts. In 1853, Pennsylvania’s detention of four slave catchers, arrested for trespass, was overruled under authority of the Force Act. In the long term of habeas jurisprudence, this marked a significant shift toward federal de novo review — a fresh review of the case from the beginning — of state decisions. More important at the time was habeas’s effectiveness in protecting slavery.

The Fugitive Slave Act faced resistance on the state level. New York refused to convict all but one of twenty-six people who had helped William Henry, a runaway slave, escape from his master. Wisconsin, in particular, responded boldly by outright nullifying the Fugitive Slave Act in 1850. Joshua Glover, an escaped slave from Missouri captured by U.S. marshals and taken to Milwaukee, inspired abolitionist Sherman M. Booth, journalist behind the Free Soil Democrat, to call for his release via habeas corpus. A local judge issued the writ, which U.S. marshals declared void. Citizens from Milwaukee and Racine flooded the jailhouse, broke down the doors, and freed Glover. The county judge had the slave master and marshals jailed on charges of assault. The master himself was freed on habeas corpus.

Charged with aiding and abetting a fugitive slave, Booth found himself in jail and applied for a writ to Wisconsin State Supreme Court Justice A. D. Smith, claiming that his custodian, U.S. Marshal Stephen V. R. Ableman, was holding him illegally because the Fugitive Slave Act itself was unconstitutional. Booth further argued that

44 Wert, Habeas Corpus in America, 48.
45 Wert, Habeas Corpus in America, 50.
46 Wert, Habeas Corpus in America, 64.
47 Hertz and Liebman, 49.
the arrest warrant was defective on its own terms. The judge issued a writ, ordering
Ableman to bring forth Booth and the reason for his commitment. The judge found
the return lacking and ordered Booth discharged. The State Supreme Court issued
a certiorari writ to review the case and upheld Judge Smith’s decision.48

The marshal sued out of a writ of error and the case went to the U.S. Supreme
Court. Meanwhile, Booth was indicted before U.S. Commissioner Winfield Smith
in January 1855 and was sentenced by a jury to a month in prison and a $1,000
fine, plus the costs of prosecution. Until he complied, Booth would remain in
custody.49 Notable court cases showcased the tension between state and federal
courts exercising concurrent jurisdiction over federal detainees,50 but the most sig-
nificant development that foreshadowed the nationalization of habeas corpus in the
latter nineteenth century occurred with Ableman v. Booth.51

Chief Justice Taney delivered the opinion of the Supreme Court. In doing so,
he emphasized the supremacy of the federal government on such matters as the
Fugitive Slave Act, which forbade state obstruction with federal fugitive slave efforts,
and which he considered fully within the powers of the national government under
the Constitution.

Taney accused the Wisconsin court of asserting, in an unprecedented manner,
“the supremacy of the State courts over the courts of the United States, in cases arising
under the Constitution and laws of the United States.”52 He argued that allowing
fully concurrent jurisdiction, where the states had the power to free federal prisoners
detained under federal law, would bring about a chaotic reductio ad absurdum in
the constitutional order:

If the judicial power exercised in this instance has been reserved to the States,
no offence against the laws of the United States can be punished by their own
courts without the permission and according to the judgment of the courts of the
State in which the party happens to be imprisoned, for if the Supreme Court of
Wisconsin possessed the power it has exercised in relation to offences against the act
of Congress in question, it necessarily follows that they must have the same judicial
authority in relation to any other law of the United States, and, consequently,
their supervising and controlling power would embrace the whole criminal code
of the United States, and extend to offences against our revenue laws, or any other
law intended to guard the different departments of the General Government from
fraud or violence. And it would embrace all crimes, from the highest to the lowest;
including felonies, which are punished with death, as well as misdemeanors, which
are punished by imprisonment.53

50 Norris v. Newton, et al., 5 McLean, 99; US v. Rector and Ellis, Id. 174, Justice Nelson’s Exposition of
the Fugitive Slave Law, 1 ballotf. 641–43, Ex parte Jenkins, 2. Wall. Un. 521, cited in Church, 78.
51 62 U.S. 506 (1859).
Taney claimed not to “question the authority of State court or judge who is autho-
rized by the laws of the State to issue the writ of habeas corpus to issue it in any case
where the party is imprisoned within its territorial limits, provided it does not appear,
when the application is made, that the person imprisoned is in custody under the
authority of the United States.” But at the same time, he asserted that

[A]fter the return is made and the State judge or court judicially apprized that the
party is in custody under the authority of the United States, they can proceed no
further. They then know that the prisoner is within the dominion and jurisdiction
of another Government, and that neither the writ of habeas corpus nor any other
process issued under State authority can pass over the line of division between the
two sovereignties. He is then within the dominion and exclusive jurisdiction of the
United States.54

In possible anticipation of protest that this decision was a blow against the sovereignty
of the states, Taney wrote in his decision:

Neither this Government nor the powers of which we are speaking were forced upon
the States. The Constitution of the United States, with all the powers conferred by
it on the General Government and surrendered by the States, was the voluntary act
of the people of the several States, deliberately done for their own protection and
safety against injustice from one another. . . .

Now, it certainly can be no humiliation to the citizen of a republic to yield a
ready obedience to the laws as administered by the constituted authorities. On the
contrary, it is among his first and highest duties as a citizen, because free government
cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign
State to observe faithfully, and in the spirit of sincerity and truth, the compact into
which it voluntarily entered when it became a State of this Union. On the contrary,
the highest honor of sovereignty is untarnished faith.55

Thus, in 1859, Taney found himself on the side of national power and the Fugitive
Slave Act and against the most radically broad interpretation of the rights of the
individual states. But he did not always side with the federal police power, at least
when he thought it interfered with the authority of the states and the “rights” of white
slaveowners. Two years earlier, Taney had handed down one of the most infamous
Supreme Court rulings in U.S. history, \textit{Dred Scott v. Sanford}, which upheld the
individual rights of slaveowners to carry their “property” into free territories. Taney
notoriously held that the Founders had conceived of blacks as having “no rights
which the white man was bound to respect,” and therefore they had no rights as
citizens or the legal standing to sue. In doing so, the Court had, for the second time
in its history, struck down federal legislation as unconstitutional – finding that the

54 62 U.S. 506, 523.
Missouri Compromise unconstitutionally designated free territories, in violation of slaveowners’ Fifth Amendment right to property in their slaves. In *Dred Scott*, Taney upheld the rights of slaveholders, as protected and recognized under state law, above the supremacy of Congress in its efforts to forbid slavery in the territories. But in *Ableman v. Booth*, Taney upheld the federal supremacy in the Fugitive Slave Act above the rights of states to issue writs of habeas corpus to free federal prisoners. The constants in both decisions are a support for slavery and opposition to legal obstruction to slavery, rather than any principled attachment to either federal supremacy or states’ rights.

Just as with the Parliamentarians, Thomas Jefferson, and others, Taney’s support for habeas seemed contingent upon his political ends. In 1859, with *Ableman v. Booth*, Taney put one of the final nails in the coffin for habeas corpus in its original American form as a decentralist check on national power. Taney would later redeem himself slightly in defending the right of federal judges – as in, himself – to issue the Great Writ as he squared off with Abraham Lincoln, America’s first president to unilaterally suspend habeas corpus.

During the Civil War and its immediate aftermath, the erosion of habeas corpus as a meaningful protection continued, whether issued from state courts or federal courts, and its reconstruction as a completely nationalized power would commence. Taney’s decision in *Ableman* signified the beginning of the end of the classical American habeas regime, and by the time he was up against his rival, Lincoln, it would be too late. The federal government had, with Taney’s help, usurped habeas corpus from the states, and his arch nemesis could continue the counterrevolution in which the chief justice himself had played a part.

Slavery carried such cultural importance that it permeated and corrupted almost all other social and political institutions. “Slavery affected the whole South,” writes Peter Kolchin in *American Slavery: 1619–1877*:

Because the antebellum South was a slave society, not merely a society in which some people were slaves, few areas of life there escaped the peculiar institution. . . . Slavery undergirded the Southern economy, Southern politics, and, increasingly, Southern literary expression. Slavery also buttressed the religious orthodoxy that set the South apart from the North, undermined the growth of a variety of reform movements, and helped shape virtually every facet of social relations.56

Slavery also determined the utilization of habeas corpus. Given the writ’s long, dark history as an instrument of power, the Great Writ’s use to enforce slavery hardly surprises. It is notable, however, that the last blows of the Americanized, subversive version of habeas were directed at undermining it. Involved in the truest act of state nullification, habeas in its anomalous decentralist form was a sword of liberty. On the other side was the centralizing state, the unholy alliance of centralized political power and the slave power. What began with a pretense of enforcing taxation over

the states ended with the federal courts preserving agents of the Fugitive Slave Act against state interposition. Then came the Supreme Court’s disarming state habeas corpus of its most potent weapon against federal detention, all in service of slavery. Although some modern commentators try to pin the states’ rights tradition on the slave power, in fact the states, acting in defiance of Washington, undermined the slave power, and the partisans of slavery deserve the distinction of having destroyed the most radical instrument in the history of states’ rights and the most anti-authoritarian of habeas legacies in the realm of checking the custodian – the power of state courts to question federal detentions. In the decade that followed, the federal government revealed the depth of its loyalty to the principles of habeas corpus when it faced its greatest institutional crisis, a challenge to its very legitimacy.
Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

– Ex parte Milligan

The American Civil War occasioned the suspension of habeas corpus, the Union’s arrest of thousands of citizens in the North and South, the use of military commissions for civilian detainees, and the enforcement of martial law. The war raised questions concerning who possessed the power to suspend habeas and what a suspension entails – questions that have not been decisively answered to this day. The federal executive branch revealed itself as an unreliable guardian of habeas corpus, but Congress also demonstrated a willingness to undercut liberty. Moreover, to the extent the courts stood up to the onslaught, hypocrisy, inconsistency, and ineffectiveness characterized the judicial response. When habeas corpus was most needed as a check on power, power won.

In the years of Civil War and Reconstruction, the U.S. political system underwent a fundamental revolution, signaling the end of the old republic crafted by James Madison and the Framers as a compromise between the radical decentralist ideas of the Anti-Federalists and the nationalist, centralizing agenda of the Federalists. With the political revolution of the 1860s, the centralizers won. During the war, Abraham Lincoln and his Republican allies fulfilled the nationalist agenda, first embodied in the ideas of Alexander Hamilton and later developed by Lincoln’s mentor, Henry Clay. Clay’s “American System” favored high protective tariffs and active federal support for “internal improvements” such as railways, canals, and roads.

From 1861 through 1865, the Union government violated civil liberties in numerous ways. It shut down hundreds of newspapers, undermining the freedom of speech, and suspended habeas corpus for the purpose of detaining thousands of civilians.

1 72 U.S. 2 (1866).
The Power of Habeas Corpus in America

accused of obstructing the war effort – alleged saboteurs and conspirators, rioters, defrauders of the government, draft resisters, and vocal opponents of the war. These detentions occurred under a system of martial law. Although in the post–Civil War era, thanks especially to *Ex parte Milligan*, martial law and habeas corpus suspension have been seen as distinct issues, the precise nature of their relationship was far from settled in 1861. Indeed, the war helped craft the meaning we now ascribe to these mechanisms of law and order.

While scholars have for more than a century discussed the significance of the struggles over both habeas corpus and federalism in the Civil War, the intimate relationship between the two issues has received far less attention. The Lincoln administration’s multiple suspensions of habeas corpus were in fact major episodes in the nationalization of the writ, a trend predating the war and continuing in the postbellum years. In the war and the Reconstruction that followed, the U.S. government attained supremacy over the states, limiting their authority and amassing power in the name of checking the vagaries of state government, including as it concerned habeas corpus. A decade before the war, habeas corpus was practiced as a state check on federal detention power. One decade after the war, the reversal of this power dynamic would be all but complete. In the revolutionary Civil War period, states finally lost their habeas authority over federal detentions, and the federal courts obtained this authority over state detentions.

Justice Taney’s decision in *Ableman v. Booth*, coming after years of tension between the state and federal judiciaries over their concurrent habeas corpus jurisdiction, prophesied this reconstruction of the writ. Not until the following decade did the reconstruction of federal habeas commence in earnest. Between the Supreme Court’s repudiation of state authority in 1859 and another that came in 1871, the Civil War gave Americans a close look at how much they could trust the national government to protect the Great Writ.

**THE PRESIDENT SUSPENDS HABEAS CORPUS**

On March 4, 1861, Abraham Lincoln was sworn into the presidency. Congress was not in session, and would not convene until July 4. Rioting rebels blocked travel in the strategically crucial state of Maryland, its people resisted Lincoln’s call for 75,000 militiamen, and the Baltimore government sympathized with the Confederacy. Perceiving the need to suppress rebel sympathizers within Union territory, Lincoln began to contemplate martial law and the suspension of habeas corpus. Although he feared Maryland’s secession, Lincoln allowed its legislature to meet, but, with the advice of his attorney general, he told General Winfield Scott on April 25:

[I]t is only left to the commanding General to watch, and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most

Church, 37–8.
prompt, and efficient means to counteract, even, if necessary, to the bombardment of their cities – and in the extremest necessity, the suspension of the writ of habeas corpus.\textsuperscript{3}

Interestingly, whereas Lincoln said habeas should be suspended only under “extremest necessity,” he did not give such a qualification in his order to bombard Southern cities, recognizing the particularly drastic nature of suspension. Although many at the time believed that only Congress, not the president, could suspend habeas – Thomas Jefferson, recognizing some limits to his power, had asked Congress to do so in light of the Aaron Burr controversy – Lincoln not only affirmed the power as his own, but delegated the authority to a military officer.

Lincoln gave another order two days later, designating a wider geographical reach for potential suspension:

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line, which is now, or which shall be used between the City of Philadelphia and the City of Washington, via Perryville, Annapolis City, and Annapolis Junction, you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where the resistance occurs, are authorized to suspend that writ.

That day, April 27, General Scott suspended habeas corpus in accordance with Lincoln’s order. On May 10, Lincoln authorized suspension on the Florida Coast, adding it to Maryland and the line between Philadelphia and Washington as places now subservient to military law.\textsuperscript{4} These executive suspensions immediately had legal effect. On May 15, 1861, Brigadeer General William S. Harney of St. Louis responded to a habeas corpus writ by declaring that it lacked jurisdiction.\textsuperscript{5}

The first arrests captured Baltimore residents who allegedly tried to stop Union troops from reaching Washington. Baltimore’s mayor, legislators, police commissioners, and newspaper editors found themselves detained at Fort McHenry and Fort Warren.\textsuperscript{6}

John Merryman from Maryland, a lieutenant drill master for a militia company implicated as part of the Confederate Army, helped drive Pennsylvania forces from his state and assisted in obstructing U.S. mail and destroying bridges and railroads to keep the Union army out.\textsuperscript{7} He was arrested on May 25 and detained in Fort McHenry for “various acts of treason . . . and avowing his purpose of armed hostility against the government.” In response, on May 26, serving as a Maryland circuit judge


\textsuperscript{4} Halbert, 98–9, 104.

\textsuperscript{5} Louis Fisher, \textit{Military Tribunals}, 45.


\textsuperscript{7} Sidney Fisher, 456.
but ambiguously in his capacity as the chief justice of the Supreme Court, Judge Roger Taney issued a writ to General George Cadwalder at the fort, directing him to bring forth Merryman the next morning. Colonel Lee responded that habeas corpus had been suspended and “error should be on the side of the safety of the country.” Taney replied by ordering Cadwalder arrested.

*Ex parte Merryman* was the first and only case that directly addressed the question as to whether the suspension power was to be practiced by Congress or the executive. Taney held

that the petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.

Taney decried Lincoln’s claim not only to “the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer.” He noted that Jefferson never claimed such power during the Aaron Burr conspiracy and argued that the suspension power clearly belongs with Congress because “[t]he clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th 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.”

Taney reasoned that even if Congress had suspended the writ, people not subject to the articles of war would still have a right to a jury trial under the Sixth Amendment. His decision, like many habeas decisions, recounts the history of habeas corpus from the “long struggle in England between arbitrary government and free institutions” all the way through the American experience. He argued that in England, only Parliament could suspend habeas corpus, and the U.S. president should not have a power beyond that of a king. Taney condemned Lincoln’s actions as going 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

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8 Taney seems deliberately to have described himself solely by his Supreme Court position in documents concerning this affair, and whether he was acting as an individual judge of the Supreme Court while it was not in session or as a Circuit Judge has been a subject of debate. See Brian McGinty, *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus* (Cambridge, MA: Harvard University Press, 2011), 80–1.

9 Halbert, 99.

10 17 F. Cas. 144 (1861).

11 Halbert, 100.
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.\textsuperscript{12}

The chief justice instructed the court clerk to send a copy of the decision to Lincoln, saying it was up to the president to set matters right.\textsuperscript{13} Merryman was not released but Taney worked to delay the trial date. Merryman never saw trial and a civil court eventually released him on bail. The biggest short-term effects of Taney’s decision were angering the Unionists and the encouragement of Southerners who saw it as a Confederate victory. The decision, published and distributed in pamphlets, traveled the grateful South.

Lincoln responded to the decision by ignoring its legal force. The controversial arrests spread to the west.\textsuperscript{14} Lincoln continued unilaterally suspending habeas corpus. On June 20 he singled out one man, Major William Henry Chase, an alleged traitor to the Union Army, for whom habeas was suspended regardless of where he was captured. On July 2, Lincoln suspended habeas for the line between New York and Washington.\textsuperscript{15} Along with these acts of suspension, military tribunals emerged in various parts of the country to enforce martial law.\textsuperscript{16}

On the Fourth of July, as Congress convened its first special session since Lincoln’s inauguration, the president defended his policy. He said the Constitution was silent on who had suspension policy, and it was unreasonable for him to wait until Congress convened.\textsuperscript{17} He presented an elaborate defense of his suspension’s legality, deliberately couching terms in the passive tense – that is, “it was considered a duty . . . to authorize . . . [suspension] of the writ” – and yet appealing to the desire to save the Union even at the expense of a constitutional law. He asked rhetorically: “Are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?”\textsuperscript{18}

This statement has gone down in history as one of the most famous concerning habeas corpus. Peter Irons has noted that “Lincoln’s dismissal of habeas corpus as a ‘single law’ that protected more guilty than innocent citizens speaks volumes about his attitude toward the Great Writ.”\textsuperscript{19} Although Lincoln conceded implicitly at the least that he had violated the law – and a most important law at that – he also

\textsuperscript{12} F. Cas. 144 (1861).
\textsuperscript{13} Halbert, 101.
\textsuperscript{14} Sidney Fisher, 457.
\textsuperscript{15} Halbert, 101–4.
\textsuperscript{16} Louis Fisher, Military Tribunals, 41.
\textsuperscript{17} Halbert, 102.
\textsuperscript{18} Lincoln originally wrote much of the speech in the first person, only to intentionally change much of the language to the passive voice (McGinty, 96–116).
maintained that he had the power to suspend habeas, because public safety and rebellion forced his hand.\textsuperscript{20}

Habeas corpus endured abuse in the Confederacy as well. The centralization of power in the South led to the adoption of military socialism, censorship, military conscription, and, in a limited context, alcohol prohibition. In some cases, these changes accompanied violations of traditional liberties as severe as or even more severe than transpired in the Union.

Confederate President Jefferson Davis hoped to win over Maryland, a border state as strategically valued by the South as by the North, and garner public support by decrying Lincoln’s use of military detention in that Union slave state. On February 22, 1862, Davis boastfully contrasted his government’s respect for “constitutional liberty” compared to the North’s violations of “civil process”: “The [Southern] courts have been open, the judicial functions fully executed, and every right of the peaceful citizen maintained as securely as if a war of invasion had not disturbed the land.”\textsuperscript{21}

Five days later, Davis suspended habeas corpus with the Confederate Congress’s blessing. The same day, he issued an order establishing martial law. In the next couple years, he issued a dozen orders suspending habeas, shoring up military law, and compromising civil liberties. Thousands were detained without meaningful due process in the midst of hostilities. In February 1864, Davis explicitly asked Congress to empower him to suspend habeas, lashing out at political enemies whose “treasonable design is masked by a pretense of devotion to State sovereignty.” States’ rights as well as civil liberties became casualties of the South’s war of secession.\textsuperscript{22}

The South did not have military commissions precisely analogous to the Union’s, although it did employ Habeas Corpus Commissioners who achieved much the same result. These military authorities detained civilians and, at their discretion, recommended civil process, but were unconstrained by formal rules, guidelines, or mandated court recording. The writ did not undergo continual suspension in the Confederacy, but even when habeas was officially alive and well, military prisons detained civilians, although arrests slowed down. These continuing violations of liberty despite the official presence of habeas as well as supposed civil law further demonstrated the practical limits of due process. Many detainees were nothing but political dissidents, imprisoned for “damning” the Confederacy,” being disloyal, or otherwise qualifying as a “Union man.” Early in the war, one estimate puts the portion of military arrests of civilians attributable to censoring dissidents at more than 13 percent.\textsuperscript{23}

\textsuperscript{20} Halbert, 100, 102.
\textsuperscript{21} Mark E. Neely Jr., Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism (Charlottesville: University of Virginia Press, 1999), 156.
\textsuperscript{22} Neely, Southern Rights, 165–7.
\textsuperscript{23} Neely, Southern Rights, 80–94.
CONTROVERSY OVER SUSPENSION POWER

In the midst of the controversy over Lincoln’s suspension, Attorney General Edward Bates defended the president’s broad powers. Bates said Lincoln could legally arrest anyone “known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity,” and ignore habeas corpus writs. Bates believed the president must, “of necessity, be the sole judge” of how to handle the rebellion and, going further than Lincoln himself, thought no court had the right to challenge such power.24

The Constitution does not clearly say who has the power to suspend habeas. The question has continued to elicit disagreement in the many years since Merryman. To this day some insist the power lies with the president. Before Lincoln’s actions, the dominant view held that Congress possessed the power. In Marshall’s decision in Bollman (1807), the chief justice stated that the suspension power presided in the legislature. Justice Story agreed in his 1833 “Commentaries on U.S. Constitution.” The common understanding saw Congress as the competent body to determine what qualified as invasion, rebellion, or threats to public safety – all crucial matters in deciding whether habeas could be suspended.25

But Bates’s and Lincoln’s position soon became accepted by contemporary legal authorities, including Theophilus Parsons, Judge Joel Parker, and Horace Binney.26 Binney believed that the habeas corpus clause laid out conditions of executive cognizance, rather than legislative. War is the president’s department.

Binney argued that the suspension language implied a grant of power, one that could possibly be interpreted as attainable by the executive. Others have suggested that the power to suspend was unlimited in the legislature before it was restricted by the Suspension Clause, meaning that it resides with Congress alone.27 Binney found Taney’s reliance on English precedent particularly unpersuasive. Some ambiguity arises because in England, suspension worked differently. Instead of the privilege being suspended for a class of specified outlaws, the entire Habeas Corpus Act was suspended.28 Traditionally, it is the ministry that would violate habeas corpus, and then seek a grant of indemnity from Parliament.29 In the United States, it is the privilege of the writ of habeas corpus that becomes suspended. The writ is still issued; it simply has little effect. And suspension alone does not immunize public officials on acts of wrongful arrest.30 Moreover, Binney argued that in England, Parliament rather than the executive had the power because in Britain suspension was unconditional – this would be too much power for one man. But Lincoln’s

25 Mian, American Habeas Corpus, 121.
26 Halbert, 105.
28 Church, 38.
29 Sidney Fisher, 483.
30 Church, 39.
suspensions were more qualified and therefore did not rise to the level of royal power. Some scholars argue these differences between the British and American models are overstated, because in England, Parliament doesn’t actually suspend the writ; it merely authorizes the executive to do so.\textsuperscript{31}

Some argued that Congress got its powers to suspend habeas not from its authority to regulate the judiciary, but from its power to suppress insurrection and repel invasion. George M. Wharton said suspension was just part of the congressional powers to declare war, regulate military captures, raise and support armies, call forth the militia, and make all necessary and proper laws, and that the Suspension Clause merely restricted this power.\textsuperscript{32} Binney, a partisan of executive power, considered such unspoken congressional power despotic. Suspension was a municipal law device, he argued, lest it be used indiscriminately. Wharton responded that Congress had implied powers, such as the authority to define and punish criminal offenses. If it can do everything necessary and proper to quash rebellion, this meant it had the power to suspend habeas corpus.\textsuperscript{33}

Others appealed to military necessity, arguing that if Congress alone could suspend habeas, there would be no way to suspend it if Congress is not in session, and this would simply be intolerable.\textsuperscript{34} As the commander in chief of the armed forces, Lincoln could suspend habeas corpus or even declare martial law. Chief Justice Salmon Chase later said that Lincoln had instituted martial law, sweeping aside questions of constitutionality.\textsuperscript{35} Joel Parker of Harvard Law School criticized many aspects of Taney’s decision in\textit{Merryman}, noting the tension between his confidence in that decision and his decision in\textit{Luther v. Borden} in 1849, upholding the use of military law to suppress the Dorr Rebellion in Rhode Island.\textsuperscript{36} As with Taney’s 1859 decision in\textit{Ableman v. Booth},\textit{Luther v. Borden} appeared to run in conflict with the Chief Justice’s heroic stand for habeas in 1861.

CONGRESS DEFERS TO THE EXECUTIVE

If Congress did indeed properly possess authority over the suspension power, it surely never effectively asserted this authority against Lincoln. Congress’s complacency in the face of the president’s suspension renders debates over the suspension power something of a moot point, at least concerning the Civil War.

During a special session in July 1861, Congress considered a resolution to authorize Lincoln to suspend the writ. Members mulled over the ambiguous language, trying to determine whether it merely recognized the president’s authority to do as he had

\textsuperscript{31} Sidney Fisher, 464.
\textsuperscript{32} Sidney Fisher, 470.
\textsuperscript{33} Sidney Fisher, 470–1.
\textsuperscript{34} Sidney Fisher, 460, 465.
\textsuperscript{35} Sidney Fisher, 478, 459.
\textsuperscript{36} McGinty, 125.
done, or whether it would legalize his otherwise unlawful act, thereby implying his criminal behavior. No such law resulted from this session.\textsuperscript{37}

In August 1861, Congress appropriated money for troops while retroactively endorsing much of what Lincoln had done regarding the war:

All acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty one, respecting the Army and Navy of the United States, and calling out or relating to the militia or volunteers from the states, are hereby approved and in all respect legalized and made valid, to the same intent and with the same effect as if they had been issued and done under previous express authority and direction of Congress and the United States.\textsuperscript{38}

This act did not, however, include an authorization for the suspension of habeas corpus. Nevertheless, nothing stood in the president’s way as the expansion of military law and erosions of habeas corpus continued. On October 14, 1861, Lincoln, in an order likely crafted by Secretary of State William Seward, authorized the suspension of habeas in places between Bangor, Maine, and Washington, DC. Military arrests of civilians came under the authority of Seward and the State Department through February 1962, at which point the Army took them over. Seward officially oversaw at least 864 such arrests, although he did not directly order or even meaningfully coordinate most of them. During this period, most of these arrests involved accused Confederate fighters and rebels in Maryland. A minority of around 125 were citizens caught north of the border states.\textsuperscript{39} For most of the war, habeas corpus and civilian law persisted in the upper North.

In October 1861, Lincoln ordered the provost marshal of the District of Columbia to surround Circuit Judge William M. Merrick’s home with armed sentries and keep him under close surveillance. Merrick had issued a writ of habeas corpus to John Murphy, a seventeen-year-old, on the grounds that he was illegally detained as an enlistee.\textsuperscript{40} In the past, even state judges could issue writs to challenge federal military detentions. Now a federal judge was being undermined for exercising his traditional judicial power. On November 21, Lincoln empowered his generals to impose martial law and on December 2 authorized suspension of habeas in militarily designated Department of Missouri.

The House of Representatives passed legislation to regulate the detention process in July 1862 and to hold military detention authorities answerable to federal courts. It failed in the Senate.\textsuperscript{41}

\textsuperscript{37} George Clarke Sellery, “Lincoln’s Suspension of Habeas Corpus as Viewed by Congress,” Bulletin of the University of Wisconsin History Series, No. 3, 1907.
\textsuperscript{38} Fisher, Military Tribunals, 42.
\textsuperscript{39} Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties (New York: Oxford University Press, 1991), 23.
\textsuperscript{41} Sellery, 56–8.
On August 8, 1862, Secretary of War Edwin Stanton issued a sweeping order authorizing marshals and police chiefs to arrest people discouraging enlistment in the military or who were guilty of giving aid and comfort or otherwise being disloyal. Stanton decreed that “the writ of habeas corpus is hereby suspended in respect to all persons” arrested under his orders, including “for disloyal practices.” This unleashed a flurry of arrests at a rate much higher than during the rest of the war. Historian Mark E. Neely, Jr., in a book otherwise charitable to the sixteenth president, describes the “sweeping and uncoordinated arrests” as “the lowest point for civil liberties in U.S. history to that time, and one of the lowest for civil liberties in all of American history.”

On September 24, 1862, the administration suspended habeas corpus for any case in the United States concerning “rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilt of any disloyal practice, affording aid and comfort to rebels against the authority of the United States.” This was Lincoln’s most formal and wide-ranging proclamation of suspension. It established military commissions for war-related offenses, including military trials for Americans who discouraged enlistment and conscription and the suspension of habeas for such prisoners. The suspension immediately shielded executive detentions against habeas scrutiny.

When more than a hundred draft rioters were arrested in Wisconsin and turned over to the Army for court martial, the Wisconsin Supreme Court issued a writ of habeas corpus, asserting that the case belonged under state jurisdiction. Following Taney’s lead, some federal courts also chimed in, questioning Lincoln’s delegation of the suspension power to the military. In 1862, a District Court ruled that only Congress could suspend habeas. But other courts had more disagreements with Taney. In Ex parte McQuillon (August 5, 1861), the Southern District Court of New York referred to Merryman with some defiance, saying it “would express no opinion whatever, as it would be indecorous on his part to oppose the chief justice.” Judge Hall of New York in Ex parte Benedict and Judge Smalley in the District of Vermont in Ex parte Field expressed some differences with Merryman, the latter upholding Lincoln’s power to suspend the writ and impose martial law, but denying that the Department of War could do so.

Military law was a blunt weapon, and not just against Confederate soldiers. In August 1862, hostilities erupted between the Dakota Sioux, American soldiers, and settlers. The Sioux had a legitimate grievance – after buying from them 24 million
acres of land, the government failed to pay the full sum of $1,410,000 that it had promised. Hundreds died in the fighting, after which Colonel Henry Sibley created a military commission presided over by officers who had fought in the conflict. The summary judgment found 392 Dakota guilty and recommended that 303 be hanged. Forty-two were tried in one day. Navy Secretary Gideon Welles did not approve of this charade of a trial, but General Pope pleaded Lincoln to swiftly execute the convicted. The tribunal had violated an 1862 Army policy that guaranteed for military tribunals the same procedural rights observed in court martial. The president ultimately found forty of the Indians guilty of rape or massacre and ordered the execution of thirty-eight, pardoning the remainder.\(^{50}\) It was the largest mass execution in U.S. history.

In late 1862, Congress deliberated again on whether to authorize the suspension of habeas corpus. On December 1, Indiana Senator Lane warned that asserting congressional authority on habeas suspension would spark “a conflict of authority between Congress and the President, and weaken the power of both.” A Vermont Senator similarly chimed in on behalf of broad executive authority.\(^{51}\) Before Lincoln’s suspension, most believed that the power lay exclusively with Congress. Now, suddenly, some in Congress questioned whether they had any authority on the matter at all. Congressmen openly debated the possibility that Lincoln had violated the law. The House passed a bill in December 1862 to indemnify the president for suspending habeas, but it failed in the Senate.\(^{52}\) After more abortive attempts at a joint resolution, Congress finally decided to indemnify Lincoln for any illegal suspension that may have happened – the same kind of blanket immunity traditionally given after a suspension in Britain – and on March 3, 1863, Congress passed the Habeas Corpus Suspension Act, establishing

\[\text{[t]hat, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof.}\]^{53}\n
Some in Congress saw the Act as merely a declaration that everything Lincoln had done was legal. Lincoln had, between his inauguration and the passing of the Suspension Act in Congress, unilaterally suspended habeas corpus eight times,\(^{54}\) although some of these orders were redundant in light of previous suspensions.

In fact, the Act gave Lincoln more power than he had sought.\(^{55}\) It “authorized [the president] to suspend the privilege of the writ of habeas corpus in any case

\(^{51}\) Halbert, 112.
\(^{52}\) Sellery, 56–8.
\(^{55}\) Halbert, 113.
throughout the United States.”

It shielded military officials from having to issue returns to habeas corpus writs. It directed district courts to accept the president’s civil and criminal authority as though Congress itself had backed his decisions. In this way, Congress asserted competence in the area of habeas while claiming the right to delegate that power to the president. Also known as the Habeas Corpus Indemnity Act, it also sought to immunize federal officials from state prosecution through the use of habeas corpus.

Then, on September 15, 1863, Lincoln reiterated his nationwide suspension of habeas corpus in all cases deemed relevant to suppressing the Confederacy.

Whereas, in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law or the rules and articles of war or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offense against the military or naval service.

Some courts, including at the state level, continued deliberating upon the implications of habeas law, now that the issue had been brought to the forefront. There was a concern that the Union’s war effort would bring the end of state sovereignty. In 1863, an Indiana court found in Griffin v. Wilcox that neither Congress nor the president could suspend habeas at the state level – that it was up to the state legislature. But it conceded that state courts could not interfere with the federal judiciary, a major concession to the new nationalist order.

Lincoln’s suspension of habeas enabled the persecution of political opponents. The United States arrested people on mere suspicion and denied them the privilege of the writ, holding many without warrants in prison indefinitely. In April 1863, General Ambrose Burnside declared that those expressing “sympathy” for the South would be shot. On May 1, former Ohio Congressman Clement Vallandigham gave a speech in opposition to Lincoln’s war and four days later found himself arrested under Burnside’s General Order No. 38. Although Lincoln found the arrest troubling, seeing it as perhaps rash and unnecessary, he argued that it would have been

56 Wert, Habeas Corpus in America, 88.
57 Mian, American Habeas Corpus, 137.
58 Wert, Habeas Corpus in America, 87.
60 Church, 43.
61 Sidney Fisher, 455, 457.
62 Louis Fisher, Military Tribunals, 58.
justifiable if, as was the accusation, Vallandigham had in fact been “warring upon the military.” In response to the arrest’s controversy and in defending generally the policy of military detaining those deemed threatening to the Union, he cited Jackson’s suspension of habeas corpus in New Orleans in 1814. Most famously, Lincoln asked rhetorically:

Must I shoot the simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? . . . I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy.63

Vallandigham was tried by a military tribunal, protesting all the time that the trial had no jurisdiction over him. He sought a habeas corpus writ, which the Supreme Court denied in February 1864 on the grounds that under the Judiciary Act it had no appellate jurisdiction over military tribunals. Lincoln commuted his sentence and ordered his transfer beyond U.S. military lines.64

Complicating historical narratives that depict the Union’s cause mostly as an anti-slavery venture, Congress at least once dropped an opportunity to use habeas corpus as an abolitionist tool. During deliberation over one of the Confiscation Acts, a measure to seize rebels’ property, there was a proposal to use habeas corpus to liberate black Americans. This idea died in committee, as at least one prominent member adamantly opposed the implication that slaves should be treated legally as persons, rather than as property.65

To this day, historians and scholars have tended to repeat the estimate that thirteen thousand Americans were detained without charge or tried by military commissions due to Lincoln’s suspension of habeas corpus, often emphasizing those jailed for dissent against the war.66 Neely, however, has argued that this estimate is considerably too low but that most accounts suffer from insufficient nuance in describing the nature of the arrests. The difficulties in finding accurate figures and categorizing detainees are numerous. Records were incomplete and sometimes overlapped. The Lincoln administration’s detention policy suffered from imperfect coordination and organization. Military authorities classified prisoners imprecisely. “Prisoners of war,” Confederate soldiers and sailors, “United States prisoners,” and “prisoners of state” – the latter class reserved for civilian detainees – did not always neatly categorize detainees. The taxonomy of civilians and soldiers was hardly an exact science, especially as the Civil War became a total war and the arrests tended to move southward. Identifying nearly 13,000 particular citizen detainees even from very incomplete records, Neely concluded that the total number must be far higher. “It is clear that far more than 13,525 civilians were arrested.” At the same time,

63 Halbert, 107.
64 Louis Fisher, Military Tribunals, 58; Halbert, 108.
65 Wert, Habeas Corpus in America, 86.
66 Hafetz, Habeas Corpus After 9/11, 89.
cases like those of Vallandigham, arrested primarily for reasons of censorship, were “disproportionately memorable” and, in fact, relatively rare. Although the Union jailed civilians for Confederate sympathies or possession of pro-Confederate paraphernalia, it much more often jailed draft resisters, alleged saboteurs and collaborators, or those accused of defrauding the Union government in war contracts. In regard to one military order, Lincoln emphasized that he only wished to arrest those whose actions had “palpable injury to the Military” and did not wish otherwise to “interfere with the expression of opinion in any form.” Neely concludes that “there were more arrests, but they had less significance for traditional civil liberty than anyone has realized.”

Although Neely’s research is very compelling, it raises questions as to the propriety of conscripting citizens, jailing draft resisters, and militarily punishing people who undermine the war effort in nonviolent but tangible ways. Civil liberties and habeas corpus ostensibly take on importance even in offenses outside of censorship. War raises the stakes incredibly and if it cannot be waged without thousands of citizens arrested and subjected to indefinite detention or military trial, whatever the proximate rationale, it appears that the war policy itself might have much to answer for.

Putting aside the precise nature of Lincoln’s mass arrests, the Civil War brought with it expansions of executive detention power and new precedents in American martial law whose significance should not be ignored. Recognizing the severity of Lincoln’s suspension of habeas corpus, scholars ever since have seemingly found it necessary to defend Lincoln’s actions. Much of the defense has hinged on Lincoln’s intentions. Historian James G. Randall confidently asserted that “few measures of the Lincoln administration were adopted with more reluctance than the suspension of the citizen’s safeguard against arbitrary arrest.”

Brian McGinty has rigorously defended Lincoln’s legal justification for suspension in a new book, *The Body of John Merryman*, intoning that “Lincoln believed strongly in the rule of law” and characterizing Taney’s *Merryman* decision as “an aggressive assertion of judicial supremacy.”

One scholar in the 1880s went even further in praising the purity of Lincoln’s motives:

If it was unconstitutional and yet necessary in order to save the Union, it shows that the constitution is defective in not allowing the government the proper means of protecting itself. . . . He was the most humane man that ever wielded such authority. . . . He had no taste for tyranny. . . . But, nevertheless, injustice was sometimes done.

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67 Neely, The Fate of Liberty, 48.
68 Neely, The Fate of Liberty, 130–8.
69 Cited in Neely, The Fate of Liberty, 13.
70 McGinty, 2–3.
71 Sidney Fisher, 457.
Indeed, injustice was done thousands of times. Some scholars see Lincoln’s suspension of habeas as completely constitutional, which only bolsters the case that the Constitution itself provides a very limited protection of the writ, and indeed empowers the federal government – even the executive – to overturn a common law civil liberty previously enjoyed by the colonies and the states. Other scholars see Lincoln’s suspension as unconstitutional but nevertheless necessary for the war effort, which brings into question, once again, the Constitution’s supposed strength as an effective defender of habeas, as well as the effectiveness of habeas itself to curb the police power of a determined executive fueled in its rigor by a national emergency.

Therefore, habeas absolutists can sympathize with the words of Lysander Spooner, nineteenth-century radical abolitionist and opponent of the Civil War:

[Whether the Constitution really be one thing, or another, this much is certain – that it has either authorized such a government as we have had, or has been powerless to prevent it. In either case, it is unfit to exist.]

Spooner was not referring to the Suspension Clause, but the same logic applies. Under the Lincoln administration, federal habeas corpus became an empty remedy. The executive suspended it when it stood in the way. Political prisoners languished without recourse to the courts. The federal judiciary failed to protect young men from military service, as even state courts had done before the war. The Merryman decision, coming from a hypocritical and inconsistent champion of habeas, Roger Taney, had no teeth. The Supreme Court refused to come to the rescue of a congressman. Slaves, whom state habeas corpus had sometimes freed in the years before the Ableman decision, received no such relief from federal habeas, as the same Congress that supported all of Lincoln’s power grabs refused to extend its hand to liberate them. In the first years after the federal government began its all-out nationalization of the writ, all three branches exposed themselves as poor stewards of this judicial power in the role for which it first became romanticized – as a check on despotic executive detention. In the years that followed, the nationalization of habeas corpus continued, in many instances with good intentions and the rhetoric of preserving civil rights. In many cases, this too would fall short of its noble aims, as habeas continued to serve as a double-edged sword in service of both liberty and power.

72 Lysander Spooner, No Treason: The Constitution of No Authority (Boston: 1870).
The Writ Reconstructed

I have still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States.

– Chief Justice Salmon Chase

Reconstruction brought about the final nationalization of habeas corpus. After the Civil War, Congress empowered the federal judiciary to oversee state processes to enforce its polices over the South. The moment habeas corpus came in conflict with the priorities of Reconstruction, however, federal politicians worked quickly to curb federal habeas review of federal cases. Some scholars celebrate this period as a golden era in the rise of federal habeas, but it was also during this time that limits on habeas corpus’s reach over executive detentions undertaken in the name of national emergency became solidified into practice. Military law persisted well after the war, including in the trials of the Lincoln assassins. In 1871, the Supreme Court in *Tarble’s Case* finally stripped the states totally of their authority to use habeas corpus against federal detentions. Never again did military commitments and enlistments, among other examples of federal custody, fall under state-level scrutiny. Thus, this finalized habeas corpus’s reconstruction into a centralizing power, as it had emerged in England.

**LAMBDBIN MILLIGAN AND THE PERSISTENCE OF MILITARY LAW**

In 1864, U.S. citizen Lambdin Milligan from Indiana was arrested for conspiracy. He demanded civil process. At the end of the war, the Supreme Court concluded in *Ex parte Milligan* that military tribunal convictions were illegal where civil courts

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2. 71 U.S. 2 (1866).
were feasible. The commissions also rested on shaky ground because Congress did not create them. Moreover, martial law cannot follow a mere threat of an invasion—the invasion has to be real and qualify as an interruption to the civil court system. It would be a “gross usurpation of power” for martial law to continue where civil courts operated. The Court did not decide on who had the power to suspend habeas corpus. In response to Milligan, Congress passed another act of indemnity, giving amnesty to all agents of the U.S. government who had followed Lincoln’s orders from March 4, 1861, to June 30, 1866.

Despite Milligan, the military tribunals remained. An early example of such a process was the notorious trial of those accused of conspiring in the Lincoln assassination. President Andrew Johnson created a military commission on May 1, 1865, to handle the alleged assassins. Eight days later, seven men and one woman stood trial. The commission sentenced four to life imprisonment and condemned four others, including Mary Surratt, to execution. Her counsel had petitioned for habeas corpus but Attorney General James Speed quickly informed the courts that Johnson had suspended it. Speed favored the commissions, believing that Congress could properly punish offenses against the law of nations and the Constitution, and that Booth, an enemy of the government, did not enjoy the Constitution’s protections and was subject to military law. In contrast, former Attorney General Edward Bates, who loudly championed broad suspension powers under Lincoln, believed the assassination tribunals were illegal and wrongheaded. Although a majority of the commission recommended life imprisonment for Surratt, President Johnson insisted he had not seen this recommendation until after she was hanged—the first woman ever executed by the U.S. government. Notably, years later civil courts tried the assassins of Presidents Garfield and McKinley.

From April 1865 to January 1869, military tribunals conducted 1,435 trials. In 1866, a New York Circuit Court decision commented that military tribunals were illegal except for the laws of war. Some postwar tribunals, such as that of Henry Wirz, who was hanged for his treatment of Union prisoners at Andersonville, were certainly of a military nature.

Against this backdrop of military trials habeas corpus finally became a robust federal power over the states, and state habeas corpus decisively lost its authority to challenge federal detentions. In this way, the rights of detainees were transferred to the national government as the prime protector. The expansion of federal habeas corpus over state detentions happened in the legislature, whereas the stripping of state habeas review over federal detentions occurred in the federal court system. For the rights of blacks, federal habeas corpus review along with the Reconstruction Civil Rights amendments to the Constitution initially brought relief to victims of Southern

4 Halbert, 108.
repression, but soon federal habeas corpus’s inconsistent defense of prisoners’ rights became clear. With the diminution of state habeas corpus reach, one of the greatest checks on federal power to have emerged from the American Revolutionary tradition would die.

Although many historians have seen Reconstruction as a period of decline for the federal judiciary’s power and an upsurge in congressional authority, William Wiecek has argued that “the business and the powers of the federal courts were expanded by Congress in the Reconstruction period to an extent that has no parallel before or since. Between 1863 and 1875, the United States judiciary was for the first time given jurisdiction fully commensurate with the broad grant of power in Article III of the Constitution.”7 According to Ken Kersch, “[t]he most significant of the new jurisdictional laws were those granting sweeping habeas corpus powers to the federal courts and those giving litigants the power to remove cases from state to federal courts.”8

One might disagree on the proper interpretation of the powers conferred to the Supreme Court by Article III, but during this period many matters previously left to the states undoubtedly moved to federal jurisdiction, including in state prisoners’ access to federal habeas corpus.9 Before 1867, state detainees had very little federal habeas corpus access, and state convicts had none, including over federally determined rights. The federal court system, unlike the state courts, practiced no common law habeas corpus power over criminal law, as much as some scholars might argue it should have. All its powers flowed from Article III of the Constitution, and the Judiciary Act of 1789 was regarded as the premier statutory source of habeas power up to that time. Under that Act, only individual judges had explicit habeas corpus powers, with courts being granted only the power needed to operate in their respective jurisdictions. The Supreme Court claimed a somewhat more expansive role under Bollman. Federal officials enforcing federal law theoretically but never practically enjoyed protection under the Force Act of 1833, and foreign aliens were protected by the Habeas Corpus Act of 1842, but beyond that, the federal courts had virtually no power over state courts, especially upon conviction.10

The statutory establishment of federal habeas corpus over state detentions came along with the other major statutory and constitutional Civil Rights reforms in the latter 1860s. Although many have described this period as featuring a decline in judicial power and a rise in congressional power, they in fact grew at the federal level during Reconstruction, ostensibly and at times in fact to protect the rights of individual blacks against state governments.

9 Wiecek, 531.
10 Wiecek, 531–5; Duker, 187.
“Reconstruction was not so much a period in American history,” writes James E. Sefton, “as it was a process by which the South’s temporarily deranged ‘proper practical relations’ to the Union, in Lincoln’s words, could be restored.” Sefton continues,

States had to be restored to representation in Congress, day-to-day functions of the federal government had to be restored in the South, and individual rebels restored to their loyalty. None of these minimal results, let alone the more sweeping interests of some northerners in confiscation of property, expansion of suffrage, extensive social reform, and military occupation, could occur unless the federal government took action. Thus, all of the specific issues of Reconstruction merged in the unifying theme of federal power.\(^{11}\)

While federal power expanded, this was an unusual period in that presidential power was anomalously in retreat. Lincoln’s successor Andrew Johnson, both because of his ideological commitment to limited government and also his reserved enthusiasm for black Americans’ rights, fought for a Reconstruction policy more restrained than the one advocated by Radical Republicans. From 1865 to 1868, the battle between Johnson and Congress, Sefton puts it, was mostly over power: who should exercise it, under what authority, against whom, upon what subjects, and for what purposes?...Though many Republicans argued that the progress and conclusion of civil war had irrevocably changed the federal system, Johnson adhered to long-held constitutional views rather than entertain new power alignments.\(^{12}\)

Competing power interests lay in the background of all of habeas history. So too did they lurk in the background of Reconstruction and the debates over habeas in the late 1860s. Moreover, the different branches had true ideological disagreements with one another. Johnson favored mercy and reconciliation toward the defeated South or at least its people. He believed they “needed peace and a helping hand instead of repression, and that they had been beaten and were now ready to reenter the Union.” The Radical Republicans initially believed that Johnson would be more open to their agenda than Lincoln. As it turned out, Johnson believed in emancipation, which was secured in December 1865, when the states ratified the Thirteenth Amendment abolishing slavery, but was otherwise skeptical of black equality, thought that blacks were probably not ready to vote, and thought such civil rights issues should be left to the states.\(^{13}\) Johnson was generally a states’ rights advocate, except on slavery,


\(^{12}\) Sefton, 105.

secession, and Confederate war debt. On the other hand, he saw his precious Union as being threatened by extremists on both sides: “One would destroy the government to preserve slavery; the other would break up the government to destroy slavery.”

On May 29, 1865, Johnson issued two proclamations, one establishing broad amnesty for Southerners coupled with a loyalty oath, the other indicating his Reconstruction policy through the institution of a provincial government for North Carolina along the lines of the ones he had established in Mississippi, Georgia, Texas, Alabama, South Carolina, and Florida. On February 19, 1866, Johnson vetoed an act to “extend the lifetime and the jurisdiction of the Bureau of Refugees, Freedmen, and Abandoned Lands” on the basis that it expanded federal power and stripped rightful owners of their property without due process. On March 27, 1866, Johnson vetoed the Civil Rights Bill because he saw it as a violation of the Tenth Amendment’s restriction on federal power and the constitutional jurisdiction of the federal judiciary. The Senate barely overrode his veto.

In June 1866, Congress passed the Fourteenth Amendment, which gave the Civil Rights Act teeth. Johnson as president had no control over constitutional amendments, but advised Southerners not to adopt the Fourteenth. Ratified in July 1868, the Amendment put the federal government in charge of protecting the “privileges or immunities” of citizens as well as the “due process” and “equal protection” rights of persons against state interference. Much of the following history of the rise of federal power at the expense of the states and the story of habeas corpus since the 1860s turned on this Amendment.

Meanwhile, the federal judiciary began using its Reconstruction powers to protect individual rights against state efforts to essentially continue slavery by another name. Acting as a circuit judge, Chief Justice Salmon P. Chase effectively enforced the Thirteenth Amendment and Civil Rights Act of 1866, striking down a Maryland Black Code that had bound an ex-slave to his master through apprenticeship. Maryland was part of the Union throughout the Civil War, but did enforce slavery until abolition and attempted to keep blacks in virtual slavery after the war.

From 1867 to 1869, a two-thirds majority opposed to President Johnson dominated the Fortieth Congress. In the spring of 1867, Congress proposed the First Reconstruction Act to divide the South, except for Tennessee, into five military districts; empower Congress and the military over local law; and require the states, as conditions for joining the Union, to adopt the Fourteenth Amendment, give suffrage to blacks, and disenfranchise former Confederate leaders. Johnson vetoed the bill, echoing the *Ex parte Milligan* ruling that military law at peacetime was unconstitutional.
In March 1867, Congress passed the Tenure of Office Act, empowering the Senate to remove cabinet members. The Second Reconstruction Act, passed over Johnson’s veto, empowered military officials to decide on questions of voting eligibility. The Third Reconstruction Act of July 1867 gave yet more power to the military over the South again over Johnson’s veto.\(^\text{20}\)

In December 1867, Johnson was impeached for violating the Tenure of Office Act by attempting to remove War Secretary Edwin Stanton from his cabinet for having failed to show him the telegram about a New Orleans race riot, for which Johnson’s inaction was blamed afterward.

THE HABEAS CORPUS ACT OF 1867: EXPANSION AND RETRENCHMENT

In February 1867, only two months after *Ex parte Milligan*, Congress passed the Habeas Corpus Act of 1867.\(^\text{21}\) It gave the federal courts habeas review powers over lower and state cases “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.” It established habeas corpus review as a review of right and made post-conviction review the norm. Much of the language came directly from the English Habeas Corpus Acts of 1679 and 1816, referring to “any person restrained of his or her liberty.”\(^\text{22}\) The Act immediately expanded all three modes of reviewing state court decisions on federal questions. It also expanded the Court’s writ of error jurisdiction – which is widely regarded as plenary.\(^\text{23}\) State criminal law from then on fell under federal authority.

There was not much discussion or consensus as to the precise scope of the Act. Early in the 29th Congress, the chairman of the House Judiciary Committee, James Wilson, had introduced a bill to “secure the writ of habeas corpus to persons held in slavery or involuntary servitude contrary to the constitution of the United States.” One legislator commented, “I confess that it is exceedingly difficult for us to determine the scope of this bill.” Some believed it applied to former slaves; others thought it would protect Southern Unionists and Reconstructionists. The chairman of the Senate Judiciary Committee, Lyman Trumbull, saw the 1867 Act as a “bill in aid of the rights of the people” so as to protect the “benefit of the writ,” for “a person might be held under a State law in violation of the Constitution and the laws of the United States.”\(^\text{24}\) Early in deliberation, Republicans claimed the range would be overly narrow, whereas Democrats feared it would mean total nationalization of the Great Writ.\(^\text{25}\)

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\(^{20}\) Sefton, 149–57.

\(^{21}\) The Habeas Corpus Act of 1867 was later codified in 28 U.S.C. §2241.

\(^{22}\) Duker, 189, 193, 195.

\(^{23}\) Hertz and Liebman, 51–2.

\(^{24}\) Duker, 190–2.

\(^{25}\) Wiecek, 538–40.
So it was that when the Act passed, two related motivations drove the effort. One was the noble desire to protect the rights of individuals, especially individual blacks, against state oppression. The year the Habeas Corpus Act passed, it was used in *In re Turner* to enforce the Thirteenth Amendment, barring slavery, as well as the Civil Rights Act.26 The less noble and more pragmatic political goal behind the Habeas Corpus Act was to enforce Reconstruction, including military law, without state governments being able to interfere. Thus, the federal judiciary could easily free Reconstruction officials detained by local governments for crimes against the people. Statutes in 1863 and 1866 protected federal officials from rebelling states’ detention, much like the Force Act of 1833 intended to protect federal officials enforcing the tariff.27

Soon enough, the Supreme Court learned of the one thing the Reconstructionists definitely did not intend for the Habeas Corpus Act of 1867 to do: interfere in any way with Reconstruction.28 Notably, the 1867 Habeas Corpus Act denied protection to “any person who is or may be held in custody of the military authorities of the United States, charged with any military offense, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.”29 The country soon realized that many of the Reconstructionists intended also to deny habeas corpus to those who stood in the way of their postwar military law.

Mississippi editor William H. McCardle was arrested under the Reconstruction Acts for his criticism of Reconstruction policies and tried before a military commission. He pleaded to a circuit court for a writ of habeas on the grounds of the validity of the law itself. He was remanded to military custody. McCardle appealed to the Supreme Court, which proceeded to hear its first case concerning its habeas jurisdiction as defined by the 1867 Act. The government argued that the 1867 Act had actually given no new powers to the Supreme Court. Chief Justice Salmon Chase originally approached the appeal with his reading of the 1867 Habeas Corpus Act, which he felt empowered him to question McCardle’s detention by a lower court.30

In the Senate, Lyman Trumbull argued that the 1867 Act was meant to protect victims of state oppression, not federal oppression. Others agreed.31 House Judicial Committee Chairman James Wilson responded to *McCardle* with an amendment to the Habeas Corpus Act of the year before. Fearing that its own law would undo military Reconstruction, Congress passed legislation prohibiting Supreme Court appellate review of lower federal court disposition of cases flowing from Section 1 of the Habeas Corpus Act of 1867. This amendment passed in 1868, once again over

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26 Wert, *Habeas Corpus in America*, 100.
27 Duker, 188, 192.
28 Wieck, 541.
29 Duker, 243.
30 Wieck, 541; Duker, 194.
31 Duker, 196; Wert, *Habeas Corpus in America*, 102.
the veto of Andrew Johnson, who warned that the amendment would “eventually sweep away every check on arbitrary and unconstitutional legislation.”

In response to the new statute redefining the Court’s habeas corpus jurisdiction, Chief Justice Salmon Chase spoke on behalf of a unanimous court that it no longer had jurisdiction in *McCordle*. The Supreme Court thus acknowledged that its new and expansive habeas corpus power had some limits.

As in many times before in history – as with the Parliamentarians who favored habeas depending on circumstance, as with Thomas Jefferson who favored it except when he was in power, as with those like Justice Taney whose partiality toward the Great Writ had more to do with his own authority or with the interests of slavery than with the principle of lawful detention itself – one day’s champions of habeas corpus, in this instance the Reconstructionists, became the next day’s skeptics.

In 1869, the Supreme Court reviewed an appealed case from a federal circuit court on the grounds that habeas corpus had been denied. A man named Edward M. Yeager had fatally stabbed a military major, the acting mayor of Jackson, Mississippi. A military commission tried him and a circuit court denied him habeas relief. In *Ex parte Yerger*, the Supreme Court claimed jurisdiction, sharply criticizing Congress for its 1868 weakening of federal habeas review and declaring that its power was “derived from the Constitution” and “defined by the [Judiciary] Act of 1789.” The Court held that “the Act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the circuit and district courts is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.”

The congressional Reconstructionists were furious. *Ex parte Yerger* threatened to open the door to federal review of the Reconstruction Acts. Congress considered a number of abortive approaches to the recalcitrant judiciary. Senator Charles Sumner suggested abolishing the Supreme Court’s appellate jurisdiction in federal habeas corpus cases; the Judicial Committee sought to exempt the Reconstruction Act from judicial review and to suspend the Court’s appellate habeas authority for the duration of Reconstruction; some proposed forbidding judges from issuing habeas writs outside their circuit. All these attempts failed.

**THE PIVOTAL CASE OF YOUNG EDWARD TARBLE**

Federal habeas corpus now stood as a recently strengthened check on state detention power and a compromised check on federal detention power, one that was no longer

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32 Duker, 195; Wiecek, 543.
33 74 U.S. 506 (1868).
34 Wiecek, 543; 75 U.S. (8 Wall.) 85 (1869).
35 Duker, 231.
36 Duker, 197.
available for military detention. Once again, the political branches decided to restrict the writ. In 1871, President Grant, empowered by Congress’s KKK Act, suspended habeas in nine counties in South Carolina to deal with Ku Klux Klan violence through the mass arrest of hundreds. The same year saw a more insidious development, one less immediately dramatic but with greater long-term ramifications for the Great Writ. In 1871, in the concluding year of the Reconstruction of habeas corpus, the last remnants of state habeas corpus as a check on federal detention power were finally swept away.

In July 1868, Edward Tarble was a minor who enlisted in the military without the consent of his father. A recruiter held him in custody when a Wisconsin court commissioner, under Wisconsin law, ordered Tarble’s discharge. The Supreme Court of Wisconsin affirmed the discharge.37 The case went to the U.S. Supreme Court on a writ of error. In Tarble’s Case, the Supreme Court held that “if a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.”38

Justice Stephen Field delivered the opinion of the Court. “The important question,” wrote Field, “is presented by this case whether a state court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States and to discharge them from such service when in his judgment their enlistment has not been made in conformity with the laws of the United States.”

Field argued that the reductio ad absurdum of allowing state challenges to military custody would be the allowance of local officials to challenge the detention even of “parties imprisoned under sentence of the national courts, after regular indictment, trial, and conviction, for offenses against the laws of the United States.”39 Following Taney’s tradition in Ableman v. Booth, which also concerned Wisconsin’s habeas power, Field reasoned that this implication of allowing the state courts review power over federal detentions would sharply and inappropriately limit federal power:

It is evident, as said by this Court when the case of Booth was finally brought before it, if the power asserted by that state court existed, no offense against the laws of the

37 Church, 82.
38 80 U.S. 397, 397–401 (syllabus) (1871).
39 Field writes: “The question presented may be more generally stated thus: whether any judicial officer of a state has jurisdiction to issue a writ of habeas corpus or to continue proceedings under the writ when issued for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a state, it may be exercised by the court commissioner within the county for which he is appointed, and if it may be exercised with reference to soldiers detained in the military service of the United States whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the state. It may even reach to parties imprisoned under sentence of the national courts, after regular indictment, trial, and conviction, for offenses against the laws of the United States” (80 U.S. 397, 401–2).
United States could be punished by their own tribunals without the permission and according to the judgment of the courts of the state in which the parties happen to be imprisoned; that if that power existed in that state court, it belonged equally to every other state court in the Union where a prisoner was within its territorial limits; and, as the different state courts could not always agree, it would often happen that an act, which was admitted to be an offense and justly punishable in one state, would be regarded as innocent and even praiseworthy in another.

Field expressed some frustration that the U.S. Supreme Court’s writ of error, commanding review of this case, had been ignored by the Wisconsin Supreme Court. He favorably quoted Taney’s remarks in *Ableman* regarding the limits of Wisconsin’s judicial power: if Wisconsin’s judges possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States, and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so, for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned.

Assessing federal and state power, Field claimed that states maintained their sovereignty and yet federal power remained supreme. The bottom line, according to Field, was that “[s]tate judges and state courts, authorized by laws of their states

40 80 U.S. 397, 403.
41 80 U.S. 397, 405–6.
42 Field writes: “There are within the territorial limits of each state two governments, restricted in their spheres of action but independent of each other and supreme within their respective spheres. Each has its separate departments, each has its distinct laws, and each has its own tribunals for their enforcement.

“Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’ Whenever, therefore, any conflict arises between the enactments of the two sovereignties or in the enforcement of their asserted authorities, those of
to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority or claim and color of the authority of the United States by an officer of that government. If such fact appear upon the application, the writ should be refused.”

Field noted that “[s]ome attempt has been made in adjudications to which our attention has been called to limit the decision of this Court in Ableman v. Booth and United States v. Booth to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation.”

So did Field decide that the “Court Commission of Dane County” in Wisconsin lacked the “jurisdiction to issue the write of habeas corpus for the discharge of the prisoner” Tarble? Thus, was the question of the prisoner’s age – the basis for challenging the detention in the first place – “unnecessary to consider.”

In his three-paragraph dissent, Chief Justice Salmon Chase, who had gone along with Congress’s curbing of federal habeas corpus for federal prisoners in McCardle, defended the old order of state habeas corpus review of federal detentions:

I cannot concur in the opinion just read. I have no doubt of the right of a state court to inquire into the jurisdiction of a federal court upon habeas corpus and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act, not by denial of the right to make inquiry.

I have still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The state court may err, and if it does, the error may be corrected here. The mode has been prescribed, and should be followed.

To deny the right of state courts to issue the writ, or, what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution. That instrument expressly declares that “the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.”

the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States” (80 U.S. 397, 406–7).

43 80 U.S. 397, 409.
44 80 U.S. 397, 410.
45 80 U.S. 397, 411–2.
46 90 U.S. 397, 412–3.
William S. Church has written that the *Booth* and *Tarble* cases “disposed alike of the claim of jurisdiction by a state court, or by a state judge, to interfere with the authority of the United States, whether that authority be exercised by a federal officer or be exercised by a federal tribunal.” William Duker has called *Tarble* a 180-degree change from the principles of *Bollman* that effectively turned the Great Writ on its head.

*Tarble’s Case* certainly meant that the era of habeas corpus as a decentralist check on national power – the way it originally emerged in the colonies and in the states that came to form the federal government in the late eighteenth century – the way it was practiced in courts throughout the United States before *Ableman* and the Civil War – was now dead. The Great Writ, used by state courts to interrupt Fugitive Slave Law enforcement and question military detentions and dubious enlistments, had become a top-down remedy, as it had originated in England. No longer could state courts challenge federal military law through habeas corpus. No longer would federal detentions be questioned on the basis of their unconstitutionality in state courts. Not again would a military recruit with a legally questionable enlistment have any recourse with a commissioner of his own state.

*Tarble’s Case* was one of the greatest reversals in the history of American federalism, and yet it is largely neglected by scholars with an interest in states rights. Within a little more than a decade, the federal government rejected state review of habeas corpus, suspended the privilege for much of the country on the say-so of the president, nationalized the privilege with the Habeas Corpus Act by putting the federal courts in charge of testing state detentions but leaving military detentions intact, soon thereafter curbed federal habeas relief for federal detentions when the writ was seen to obstruct federal Reconstruction, and then put the final nails in the coffin of the old order with *Tarble’s Case*.

The same federal government that had somewhat cavalierly disposed of habeas during the Civil War, and that limited federal habeas as soon as the writ began interfering with its militaristic Reconstruction policies, now stood as the sole arbiter on questions of federal detention. The presidency claimed the power to suspend habeas on its own. The legislative branch showed its willingness to retroactively and preemptively authorize executive erosions of habeas corpus, as well as to reform the writ in ways that empowered the federal judiciary, protected federal officials, and yet shielded federal policy from both federal and state court scrutiny. The Supreme Court itself for the most part accommodated Congress’s restrictions on its review power over federal detentions and now, with *Tarble’s Case*, claimed that state habeas corpus – which had been understood to keep federal power in check since the American Revolution – was impotent in this capacity. The greatest erosion of traditional American habeas corpus thus happened not in Congress nor at the

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47 Church, 85.
48 Duker, 311.
hands of the president, but in the very federal judiciary whose power today’s habeas partisans most celebrate.

Competing agencies of the federal government now oversaw the rights of prisoners in the federal system. The rights of prisoners in the state systems would likewise have recourse in the federal judiciary, but, as became clear, with many limits and conditions placed on such recourse. The radical structure with limited central power that had been inherited from the Founding generation was tossed aside with the Civil War and Reconstruction, as habeas corpus in its traditional function became abolished and all power amassed to the central state and the whims of its three branches.

The remainder of this book examines the success of this model from the standpoint of individual liberty. Chapters 8 and 10 focus on federal review over state criminal justice and Chapters 9, 11, 12, 13, and 14 mainly discuss federal review of executive detentions. Part III recalls the decentralist legacy of antebellum habeas corpus in light of modern controversies. It is difficult to overemphasize the revolutionary changes and broad implications of the decade during which the federal government suspended and reconstructed habeas corpus.

**THE END OF ERAS**

In 1877, as part of a compromise in a close presidential election, Republican Rutherford Hayes rose to presidential power and ended Reconstruction. After Reconstruction, the military tribunals faded away. The South was no longer subject to a borderline federal military dictatorship. The federal government now fashioned itself as principal protector of individual rights.

Chattel slavery was vanquished and the substantive rights of black Americans to life, liberty, and property were finally being seriously contemplated. The importance of this in the history of American freedom can never be overstated. But the war had also meant the end of the federalist system embraced by the Founders as the principal method of protecting individual liberty. Reconstruction ended but the precedents for federal power remained. And habeas corpus never again was the same.

Over the next century, the federal courts increasingly intervened in the name of protecting the civil rights and civil liberties of the American people against their state governments. This included the new modern era of habeas corpus construction, which had started out as a diffuse common law power in early America and would now be transformed into primarily a federal check on state decisions, and mostly after conviction. The road to effective protection of individual rights in federal court against state governments was long and rocky. The federal court system, while generally enthusiastic to reach for more power over state policy, was often no better a guardian of individual rights and liberties than were the state governments it came to police. Moreover, alongside this shift in power, the national judiciary’s effectiveness in curbing the *national* police power would be tested several times. The federal
judiciary and legislature would adopt a number of reforms that simultaneously expanded federal judicial power while limiting the access of individuals to federal habeas corpus relief.

On the state and federal levels, the practice of imprisonment would explode into common use. State habeas corpus would no longer be a check on federal detentions, and so when the federal judiciary failed to restrain federal detention power, there was nowhere else to turn. At the same time, habeas corpus became available to state prisoners after conviction, but despite this, there would also be far more convictions on the state level than ever before.
[T]his court will, in favor of liberty, grant the writ not to review the whole case, but to examine the authority of the court below to act at all.

– Ex parte Virginia

Habeas scholars often depict the period from Reconstruction to World War II as a slow, uninspiring period for the writ. Yet this era features one of the most exciting stories of federal review over federal detentions – the defense of Chinese immigrants against unfair immigration law enforcement. As for state detentions, the federal courts initially remained mostly deferential, although in the early twentieth century they began to tackle questions concerning jurisdiction, custody, and their proper scope in overseeing state proceedings marred by such vagaries as mob violence. This all occurred in the Progressive Era, typically celebrated for its liberal reforms in criminal justice. However, the correctional system’s modernization corresponding to the nationalization of political institutions deserves more scrutiny. Even as the federal court slowly undermined state-level injustices, the federalization of law enforcement brought new threats to detainees’ individual liberty.

Reconstruction and the Habeas Corpus Act of 1867 birthed a new habeas corpus regime, whereby federal courts check state detentions. Throughout the late nineteenth century and into the twentieth century, changing legal precedents, legislative reforms, and the shifting makeup of the federal judiciary brought about a number of changes in federal habeas corpus procedure. By the late twentieth century, “habeas corpus” became nearly synonymous with federal habeas review for state convicts.

The issues confronted in this period included the scope of habeas review, determining which elements of the state proceedings deserve questioning, who was eligible for habeas protection, which courts had jurisdiction over which matters,

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1 100 U.S. 339 (1879).
2 McCloskey, The American Supreme Court, 157–60.
and what “custody” entailed. In particular, the tension between federal and state courts under the new habeas corpus regime became not just a controversy but also a logistical dilemma. The shift toward federal oversight led to complications in the context of a supposedly federal system and a federal judiciary with congressionally determined jurisdiction.

The 1867 Act gave the Supreme Court jurisdiction over state court proceedings but with the mandate that it defer to and respect state determinations to a large extent. This legislation opened the door to a period in which federal courts found themselves limited in overriding state proceedings, generally doing so only in the instance of an unconstitutional statute, a lack of jurisdiction, or an unconstitutional sentence. In addition, the exhaustion of state remedies quickly became a prerequisite to federal action.3 The 1888 amendment to the Habeas Corpus Act further limited federal review.

According to Harvard Law professor Paul Bator, the power of federal habeas corpus over even federal prisoners was limited from the republic’s founding to the mid-1950s. The 1789 Judiciary Act gave federal courts the power to grant writs to scrutinize the cause of commitment, but as long as probable cause to detain could be shown – again, typically before trial – the higher courts generally let the detentions stand. Bator credits this tendency to jurisdictional deference, but others, such as New York University School of Law’s Randy Hertz and Columbia Law School’s James Liebman, point out that as early as the late nineteenth century, cases like Yick Wo v. Hopkins,4 which overruled a state regulation on the basis that Chinese-Americans were constitutional “persons” entitled to “due process,” turned not solely on jurisdiction of detention, unconstitutional sentences, or statutes. Rather, the understanding of the Fourteenth Amendment “due process” guarantee evolved. Such scholars argue that the limitations on habeas were always constitutional and statutory, and focus does not belong on the narrow distinction between jurisdiction and non-jurisdiction.5

In the ensuing habeas history, the ebbs and flows in the scope of the writ corresponded to Court interpretations of the Fourteenth Amendment. Prior to this amendment, due process protections, along with the rest of the rights protected in the Bill of Rights, did not apply to state-level action. In 1833, the Supreme Court determined in Barron v. Baltimore that the Fifth Amendment prohibition against taking private property for public use without just compensation did not bind the state of Maryland, and that, more generally, the Bill of Rights “contain no expression indicating an intention to apply them to the State governments.”6

The Fourteenth Amendment, ratified in 1868 with the most direct purpose of securing civil rights for freed black Americans, opened up a litany of possible

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3 Hertz, 39.
5 Hertz and Liebman, 40–1.
interpretations for how far the federal judiciary could now go to protect people’s rights against state action. The first section reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^7\)

The language about jurisdiction, “privileges or immunities,” “due process,” and “equal protection” soon became the subject of great debate and jurisprudential experimentation concerning the federal courts’ proper role in vindicating Americans’ due process guarantees, civil rights, free speech protections, and contractual liberty. Years later, the argument shifted from focusing narrowly on the amendment’s language to the interpretation that the Bill of Rights itself was “incorporated” by the amendment – to one extent or another – so as to protect Americans’ rights from their own states in a whole host of areas.\(^8\)

The post–Civil War constitutional order of an active federal judiciary championing the civil liberties of the accused did not emerge all at once. Indeed, even with habeas corpus, where federal law explicitly placed the federal judiciary in the business of state criminal proceedings, it took time for the federal judiciary to feel out its new role, and perhaps even longer for the other branches to adjust to the change. While it was not very controversial that federal habeas corpus should now serve as a post-conviction remedy, it was still very controversial that the federal courts could override state convictions. In *Ex parte Bridges* (1875), Justice Joseph Bradley issued a writ to a former slave convicted in state court of a federal offense. Although he granted the writ, he argued that the Habeas Corpus Act of 1867 should be repealed because it allowed federal courts to override the states. In 1884, the House Judiciary Committee recommended that the Supreme Court limit its habeas corpus jurisdiction.\(^9\)

In 1885, Congress restored the Supreme Court’s appellate powers that were repealed in 1868 in response to *McCordle*. Interestingly, the motivation was to prevent the lower federal courts from violating states rights.\(^10\) Now, once again, the Supreme Court could review legal questions *de novo* – anew. It could now, as it

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7 Fourteenth Amendment, U.S. Constitution.
9 Wieck, 544–5.
10 Duker, 198.
could before the 1868 amendment, scrutinize legal determinations of the state courts that would have, in the intervening years, been considered settled.  

Yet the federal judiciary still displayed a deference to state processes and a reluctance to intervene without clear authority. In 1886, the Supreme Court was unwilling in *Ex parte Royall* to issue a habeas writ to a detainee held by Virginia, ruling that even if it had the power to issue the writ it would have to wait until after trial. In this case, the exhaustion principle took root – the principle that lower judicial remedies such as appeal must be *exhausted* before the federal courts could step in and provide habeas relief to allegedly wronged state prisoners. As the federal courts gained more review authority over the states in certain ways, out of practical concerns if nothing else, they tended to lose such centralizing authority in other respects, or to defer more out of their own judgment.

Eventually, federal habeas corpus became more or less a functional alternative to the appeals process – not a direct appeal of right guaranteed just as a matter of process, nor as a pure substitute for a general writ of error. But as writs of error and appellate procedures became limited in the wake of the twentieth-century explosion of the criminal-justice industry, federal habeas corpus review of state convictions became an important approximate alternative.

As the federal judiciary struggled with the boundaries of legal interference with state processes, in the late nineteenth century it also had to deal with checking federal power, and on this there existed no decentralist convention against interference as there was when it came to checking state processes. As the post–Civil War government grew and began taking on roles it had more or less traditionally left to the states, the federal courts played an important role in protecting individual liberty against encroachment by the national police power, at least when they saw constitutional or legal issues at stake. But here, too, the question of what qualified as an adequate constitutional or legal objection to federal policy and practice presented the courts with some difficulty. They found themselves sometimes engaged in an evolutionary process of judicial exercise that broke new ground, and sometimes running against not just conventional wisdom but the popular prejudices of large swaths of the population.

**CHINESE RESTRICTION AND THE GREAT WRIT**

The most fascinating late nineteenth-century examples of federal habeas corpus protecting individuals against federal power concern Chinese immigrants. Starting in 1882, Congress passed laws to strictly curtail Chinese immigration, the first U.S. laws ever to limit immigration on the basis of race. Federal habeas corpus hearings

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11 Hertz and Liebman, 39.
12 *Ex parte Royall*, 117 U.S. 241 (1886).
13 Duker, 308.
14 Hertz and Liebman, 42–3.
tested these laws, earning involved jurists incredible acrimony from much of the public. Also, with these cases, the power of habeas corpus expanded beyond the typical check on detention power traditionally associated with it.

Judge Ogden Hoffman of the Northern District of California and Lorenzo Sawyer, California’s presiding circuit judge, stood at the center of this tale. Between 1866 and 1886, Hoffman worked the only federal district court for all of California. Between 1882 and 1890, the court heard more than seven thousand habeas corpus cases concerning Chinese immigration. Much of the other judicial business was put on hold to make this possible.15

Justice Stephen Field tended to dissent in these early cases on the basis that they undermined the spirit of the Chinese restriction law. Under enormous pressure to cave, Hoffman and Sawyer nevertheless believed that the Burlingame Treaty with China compelled them to allow the detained Chinese to have the full rights of habeas corpus. Although Hoffman harbored strong anti-Chinese feelings of his own, he let his understanding of the law lead him to consistently allow Chinese petitioners into the country. The 1868 treaty provided that both nations recognize “the inherent and inalienable right of man to change his home and allegiance” as well as the “mutual advantage of the free migration and emigration” of both peoples, “for purposes of curiosity, trade, or as permanent residents.” Chinese subjects in the United States were guaranteed “the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.” This treaty language was construed in the 1870s by the federal courts to override state restrictions on Chinese immigration. Throughout that decade, virtually every federal court decision concerning the Chinese drew largely upon the treaty. Only in the 1880s did federal legislation fall under similar federal court scrutiny.16

The 1882 Restriction Act suspended all Chinese laborers from immigrating for ten years but made an exemption for Chinese already in the country, who would receive return certificates if they left and intended to return. Irregularities and ambiguities in the law, combined with a San Francisco collector’s determination to enforce the law strictly, led to a flood of habeas corpus writs to the district and circuit courts.17

In In re Ah Sing,18 a Chinese cabin steward on the ship Sydney, who had lived in California since 1876, challenged his detention after officials refused him reentry without a return certificate. Field’s circuit court discharged him. Although the Sydney technically qualified as U.S. territory, the collector continued to detain sailors on the boat on the grounds that it had docked for several hours in Australia.

16 Fritz, 349–51; In re Ah Fong, 1 F. Cas. 213 (C.C.Ca. 1874) (No. 102).
17 Fritz, 352–4.
18 In re Ah Sing, 13 F. 286 (C.C.Ca. 1882).
and by going on leave briefly, the sailors had failed to be continuously within the jurisdiction of the United States.  

Further technical arguments in such cases involved who qualified as a “laborer,” and who enjoyed the treaty’s protection. In *In re Chin Ah On* (1883), Hoffman upheld the right to reenter without a certificate for a laborer who had lived in California at the time of the treaty’s ratification but had gone back to China before the Restriction Act passed.  

Hoffman demonstrated a broad support for Chinese immigrants’ habeas rights, despite his having very negative opinions about the Chinese as a race. Christian G. Fritz writes:

The numbers of Chinese who came into Hoffman’s court and succeeded in over-taxing the northern district resulted in large measure from Hoffman’s commitment to judicial due process. By insisting that each Chinese person detained by the collector had a right to challenge his detention in a habeas corpus proceeding, Hoffman insured himself of a crowded docket. Moreover, in such hearings, the Chinese were entitled as a procedural right to present any evidence, written or oral, that might establish their unlawful confinement. Denial of access to his court or the right to testify and present evidence on their own behalf was a violation of basic rights to a fair trial implicitly guaranteed by the treaty of 1880. The determination of whether Chinese were wrongfully denied liberty by the actions of the customs house officials was emphatically a matter for his court to decide. Hoffman proved unwilling to abdicate such responsibility regardless of the grief it caused him.  

In the 1884 case *In re Chow Goo Pooi*, Hoffman and his court stood by the right of the petitioner to have his case heard, despite attempts by a U.S. attorney to bypass the process by having him arrested as an illegal alien. Even more strikingly, he asserted that those deemed illegal aliens and remanded to the custody of executive officials had to await directions for deportation from the president, as spelled out in the law, or else be freed barring a “just excuse.”  

In *In re Tung Yeong* (1884), Hoffman described three types of applications from Chinese immigrants: “laborers claiming prior residence, applicants seeking to enter on Canton certificates [issued by the Chinese government], and children rejoining parents in San Francisco.” Hoffman said only the first two categories were ambiguous. Of those in the first category, he mostly found the Chinese petitioners had satisfied their burden of proof; the second category raised some doubts for him, but he said the Restriction Act designated them *prima facie* evidence of the right to enter. He further wrote that under the U.S. Constitution, “Chinese persons in common with all others have the right ‘to the equal protection of the laws’ and this included the right ‘to give evidence’ in courts. . . . To reject his testimony . . . on the

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19 Fritz, 354.  
21 Fritz, 358.
sole ground that he is a Chinese person, would be an evasion, or rather violation, of the constitution and the law.” Furthermore, Hoffman cited customs statistics showing that five times as many Chinese had left than had arrived since the Restriction Act to calm fears that his actions were causing a flood of Chinese immigrants.22

An 1884 revision of the legislation tightened up the restrictions, making return certificates the only evidence available for Chinese laborers and Canton certificates the only evidence of the right to land available to non-laborers, the latter of whom could still face challenges from customs officials.23 In light of this legislation, Hoffman defended his past actions:

That any human being claiming to be unlawfully restrained of his liberty has a right to demand a judicial investigation into the lawfulness of his imprisonment is not questioned by any one who knows by what constitutional and legal methods the right of liberty is secured and enforced by at least all English-speaking peoples.24

In Chew Heong, Justice Field found that Chinese laborers who left with certificates authorized by 1882 and returned without those mandated by the 1884 amendments were disqualified from reentering. Justice Sawyer strongly dissented. The Supreme Court reversed Field’s decision, agreeing with the dissenters.25

In October 1885, two Chinese immigrants denied entry for lack of certificates petitioned for a writ. A U.S. attorney challenged the petition, stating that customs officials had made their determination and the case was res judicata – already decided – and the district court lacked jurisdiction. Hoffman stood his ground: “The petitioner is a free man, under our flag, and within the protection of our laws.” Habeas corpus was the “most sacred” guarantee of “personal freedom” in our legal tradition and “to require the court in its investigations to be governed by the decision of an executive officer acting under instructions from the head of the department at Washington, would be an anomaly wholly without precedent, if not flagrant absurdity.” The Supreme Court upheld Hoffman’s decision.26

In January 1888, the Alta California newspaper reported that 87 percent of almost 4,000 Chinese who sought writs had been allowed to land.27 In 1888, President Grover Cleveland signed the Chinese Exclusion Act, which barred all new laborers and mandated that Chinese living in America could only reenter the country if they had family or significant property or debt owed to him in the United States. The Act also limited return certificates to one year. In 1888, Sawyer upheld the constitutionality of the Act against claims that it had illegitimately denied reentry to people whose return certificates became retroactively nullified. Justice Field,

22 Fritz, 360–1.
23 Fritz, 362.
24 In re Chin Ah Sooey, 21 F. 393 (D.C.D.Ca. 1884).
26 United States v. Jung Ah Lung, 124 U.S. 621 (1888); Fritz, 367.
27 Fritz, 368.
speaking for the unanimous Supreme Court, sustained the decision and defended the Act.  

The cases continued to mount, however. Between October 1888 and December 1890, of the 1,401 Chinese habeas corpus cases filed, 86 percent resulted in discharge for the petitioner.  

More than one thousand individuals got their freedom this way, but it came at the price of a loaded court docket and the neglect of other judicial business.

Vincent Tang has identified an even darker side to federal habeas corpus for Chinese immigrants. In the later half of the nineteenth century, perhaps half of the Chinese women immigrants were slaves or indentured servants, brought against their will and forced to work as prostitutes in San Francisco brothels or in the Comstock mines in Nevada. Much of this demand for sex workers resulted from the low rates of female Chinese immigration compared to male. When enslaved Chinese women escaped or were rescued, their “masters” used the legal system, including habeas corpus writs, to retrieve their human “property.” This shameful episode was a throwback to the days when habeas retrieved escaped slaves in the South or when judges replevied serfs in centuries past.

PROGRESSIVISM AND PUNISHMENT

After the 1880s, habeas corpus receded in use as a major instrument of enforcing national policy. According to some scholars, not until the 1960s did it again take on the importance it had during Reconstruction. Nevertheless, in this intervening period the Court worked to define its role in vindicating rights for criminal suspects in state court.

These early developments transpired in the historical context of the Progressive Era, when the modern criminal justice system came to life. Even as the federal courts increasingly monitored state criminal justice, the extent of criminal prosecution, punishment, and detention, at both the state and federal levels, began swelling into an enormity that no court system could effectively oversee.

Historians often celebrate the turn of the century and its accompanying expansion of political power as blessings for minorities, the poor, workers, women, and other disenfranchised groups. The Progressive Era, approximately defined as the period between 1890 and 1920, saw major social change and political evolution, as well as a shift in the public ideology of the American mainstream. Many revere the era’s reforms in criminal justice and due process.

28 Chae Chan Ping v. United States, 130 U.S. 581 (1889).
29 Fritz, 371.
31 Wert, Habeas Corpus in America, 117.
Yet the era left behind more than liberal reform. The Progressives laid the foundations of today’s criminal justice system. In reconstructing the penal system, the Progressives added to the list of punishable offenses and significantly altered the popular discourse surrounding crime. Most important, this movement greatly altered American political culture. In doing so, it never strayed from its core ideological commitment to use state power to reform the individual. As David Rothman puts it:

The most distinguishing characteristic of Progressivism was its fundamental trust in the power of the state to do good. The state was not the enemy of liberty, but the friend of equality – and to expand its domain and increase its power was to be in harmony with the spirit of the age.

Progressive reforms of the criminal justice system aimed at reforming individual criminals through “open-ended, informal and highly flexible policies” tailored so as to allow a “case-by-case strategy for rehabilitation.” At the state level, three of the most celebrated reforms of the criminal justice system focused on individual rehabilitation – parole, probation, and the juvenile detention system – and began a legacy that both defenders and detractors characterize for its supposed leniency.

But the parole system from the beginning was neither liberal nor lenient. First, the parole boards often comprised either busy government agents or people with no qualifications other than party loyalties. Parole in effect transferred the power over an offender’s liberty to incompetent and politically interested men. Another problem concerned the extensiveness of the parole procedure. The documents given to the parole board for review had little information other than family history, criminal records, and the number of times the parole candidate had faced prison discipline. The procedure was often brief and superficial, as parole board members based their decisions on such criteria as to whether the applicant “has a good face.” Beyond these procedural problems lay additional invasiveness once parole was approved.

32 The changes went beyond the penal system, and permeated law enforcement and the range of offenses. In California, one of the key venues of Progressive reform, the legislature passed the Red Light Abasement Act and launched the Industrial Welfare Commission, both to combat prostitution. See George Mowry, The Californian Progressives (Berkeley: University of California Press, 1951), 89. The city of Berkeley was home to one of the first modern city police forces and adopted a fingerprint identification system in 1905. See Samuel Walker, Popular Justice: A History of American Criminal Justice, 2nd edition (New York: Oxford University Press, 1998).


34 Rothman, 43.

35 Samuel Walker, 162–3, 170. People have cheered the process’s supposed respect for the individual, but the government used the process for social control, thereby extending the state’s violations of individual autonomy beyond its iron cages. Statutes often forbade parolees to associate freely with others deemed “viscous, lewd or unworthy” and barred them from attending places of entertainment, such as bars and dance halls, as a condition of parole. And although the parole boards attempted to control the parolees in such intimate ways, they often failed to keep track of them at all. A common complaint by police was that the parole boards often neglected to inform them of where the released inmates were. In addition to these logistical problems, parole and the indeterminate sentence did not
Probation also involved illiberal elements. The number of probation cases far exceeded any reduction in the reliance on imprisonment. As David Rothman points out, “Between 1908 and 1914 . . . the New York Jail population climbed more slowly than the general population (going from 3,508 to 3,935) – and over the same period, the probation rolls mounted (from 1,648 to 8,141).” Rothman concludes that rather than probation serving as a substitute for prison, it was used “as an alternative to doing nothing at all.”

36 Rothman, 59.
37 Aside from probation’s broad application, this process suffered from extreme bureaucratic inefficiency. In New York, probation officers spent an average of only ten minutes a year with each of their clients, and in Chicago the probation office could not reliably locate its clients’ files. Despite all of the problems and unintended consequences of the new probation regime, early advocates of probation for the most part did not budge in their commitment to it (Samuel Walker, 125; Rothman, 87, 90, 110, 113).

The juvenile court system has also gained an undue reputation for humanitarian leniency. Harsh adult prisons had housed youthful offenders and so the enlightened juvenile system, its proponents believed, finally helped bring criminal justice into the twentieth century. The paternalist (or maternalist) Progressives jumped at the chance to work with children in any way, whether through schools or criminal justice. Far from saving children from draconian adult punishments, however, the juvenile system transformed minors into second-class citizens, prosecuted under laws that did not affect adults, subject to harsh punishments, and deprived of due process protections guaranteed in regular criminal justice.

38 The Progressives empowered courts to deal with “truancy, cursing, masturbation, sexual intercourse, and ‘bad associations.’” The degree of moral control was staggering and disproportionately used against girls and immigrants. In Chicago, 31 percent of the girls brought into the juvenile system were there for “immorality.” In Milwaukee, 94 percent of juvenile suspects had at least one immigrant parent (Samuel Walker, 113, 116, 118).

39 The juvenile court system was inaugurated without the procedural niceties of adult criminal justice. The right to an attorney was scrapped. As Minnesota Judge Greirr Orr said, “the attorney has not very much standing when it comes to the disposition of children in the juvenile court.” The rules of testimony and the right to a trial by jury also lost their place in the new system (Rothman, 216, citing Juvenile Court Record, May, 1906; Bernard Flexner, Reuben Oppenheimer, and Katherine Lenroot, The Child, the Family, and the Court, 21–4; JCR March 1904, 4). In a 1905 Pennsylvania case, Commonwealth v. Fisher, the court ruled that children could be taken away from their parents without a criminal trial (Samuel Walker, 117, citing Schlossman, 14–15; and Breckenridge and Abbott, 181–201). Punishments were also often severe. In one case, an accused thief was taken away from his family, compelled to work on a farm, and forcefully circumcised (Samuel Walker, 116, citing Schlossman, 158–60, 167).

Some of the most famous and commemorated Progressive reformers had an open cynicism toward constitutional protections. Roscoe Pound, probably the most best-known Progressive legal theorist and reformer, spoke explicitly of his desire to eliminate the rules of evidence from criminal trials (Samuel Walker, 114, citing Roscoe Pound, Criminal Justice in America [New York: Da Capo, 1975], 161–4; Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” American Bar Association Reports 29 [1906], 395). This disdain for traditional American protections of civil rights
On the national level, where most Progressive optimism lay, the federal government became a primary crime fighter for the first time. Although the early twentieth century featured the move toward nationalizing habeas corpus, so too did it showcase the nationalization of police. The two movements shared a certain logic: the notion that the central state knew best and could elevate and liberate as well as punish and rehabilitate the flawed individual better than any community, religious, family, or local government institution. Until the twentieth century, the United States never had a national police force. Most Americans would have seen no authority for such a force among the enumerated powers in the U.S. Constitution. Under pressure from Progressive reformers, Theodore Roosevelt attempted to create one, but Congress would not cooperate. Therefore, in 1908, Roosevelt created the Bureau of Investigation by executive order.

Meanwhile, the laudable goal of providing guaranteed public defenders brought into being the American Bar Association in 1906, which effectively forced many people, mostly immigrants, out of the attorney business. In the realm of the reformed prison system, criminal justice became even less individualized and specialized in its actual treatment of offenders.

Perhaps the Progressives’ most important national legacy in criminal justice was prohibition, also its most widely recognized failure. In 1906, Congress passed and President Roosevelt signed the Pure Food and Drug Act, and in 1914 Congress passed and President Woodrow Wilson signed the Harrison Narcotics act, which outlawed heroin and restricted opium and cocaine. These policies persisted into the twenty-first century, but the Progressives’ most ambitious prohibitionist program, an agenda with many adherents going back a century, was the national abolition of alcoholic beverages. The apex of domestic Progressive reform, alcohol prohibition overtook the whole criminal justice system and unleashed such calamity that the country mobilized once again to amend the Constitution and end this Noble Experiment.

transcended theory and entered practice among the acclaimed reformers. Katherine Davis, celebrated women’s prison reformer, developed a system of savage brutality: small violations of behavioral rules were dealt with by such punishments as beatings of a prisoner hung by her wrists (Samuel Walker, 127).

40 Samuel Walker, 142.

41 Robert Wiebe attributes the drive for temperance to a “traditional Protestant respectability,” the prohibitionist agenda being a pseudo-religious, “disturbing gospel” targeted against a “contaminated community.” There were also “prominent Southerners with one eye on the Negro and another on the poorer whites.” Many people’s motivations were certainly based on a desire to impose religion or on bigotry against minorities and immigrants, but the whole program was simply consistent with the general idea of creating a better American man through national criminal justice policy. The idea of “preventative justice,” as Roscoe Pound dubbed it, and of reforming the individual had its clearest expression in the passage of the Eighteenth Amendment and the Volstead Act, which made it a federal crime to manufacture, transport or distribute alcoholic spirits (Robert H. Wiebe, The Search for Order: 1877–1920, The Making of America, David Herbert Donald [ed.] [New York: Hill and Wang, 1988], 56–7, 291; Walker, 112, citing Pound, Criminal Justice in America, 35).

42 Within a few months of the ban on liquor, the federal courts overflowed with Volstead Act violations, and by 1924 the population of federal prisons had nearly doubled. A 1923 congressional study found
IMPERIALISM AND LAW

The Progressive Era presented a paradoxical agenda of elevating the beleaguered prisoner through expansive federal power while favoring a series of foreign and domestic policies that undercut the liberal spirit of the Great Writ. Most conspicuously, its Progressivism tended to endorse the rising American empire, which took root in earnest through William McKinley and Teddy Roosevelt’s Spanish-American War and blossomed in the greatest achievement of the Progressive agenda: U.S. entry into World War I under Woodrow Wilson.

As the Spanish-American War, begun in 1898 in the guise of anti-imperialism against the colonial Spanish, transformed into counterinsurgent campaigns in Cuba and the Philippines, where the locals found their “liberators” soon became “occupiers,” the brutality of modern warfare became part of American foreign policy. The United States won Guantánamo Bay as a condition of Cuban “independence.” In the Philippines, the U.S. occupation occasioned the slaughter of as many as two hundred thousand Filipinos, including children as young as eleven who were ordered shot should they resist in the slightest. Catholic churches were burned to the ground in the name of Christianizing the island nation. Natives suffered various torments, including the water torture, as the United States discarded the widely respected Lieber standards of war.

General Arthur MacArthur utilized martial law and military commissions to tame the Philippine insurgents. Senator Thomas Patterson summed up a common American attitude in 1902 when he said, “When a war is conducted by a superior race against those whom they consider inferior in the scale of civilization, is it not the experience of the world that the superior race will almost involuntarily practice inhuman conduct?” According to this perspective, any barbarism must be attributed to the enemy.43

The territories won in the Spanish-American War raised important new questions about the reach of the Constitution’s protections to territories outside U.S. “sovereignty” but still within its effective power. In the past, contiguous territories acquired by the United States within continental America were assumed to be destined for statehood, and constitutional protections of due process, including habeas corpus, had extended to these territories explicitly through statute. But what about the territories of Guam, Puerto Rico, and in the Philippines – places not taken with the goal of statehood in mind, but rather acquired over the course of war with the

that state attorneys spent about 44 percent of their time working on prohibition cases. Corruption ran rampant. By 1926, prohibition official Lincoln C. Andrews testified in Congress that 875 officials under the Prohibition Bureau had been dismissed for bribery, corruption, and misconduct. Prohibition ended with the Twenty-First Amendment and the repeal of the Volstead Act, after a decade of corruption, violence, and immense stress on the criminal justice system (Herbert Asbury, The Great Illusion: An Informal History of Prohibition [New York: Doubleday & Company Inc., 1950], 169–70, 177).

43 Fisher, Military Tribunals, 80–1.
presumption, in most cases, that local authority would eventually regain control? The Supreme Court adjudicated such questions in the *Insular Cases*, forming a theory of territorial incorporation, whereby the Constitution itself did not automatically extend protection to such territories. The particular extent to which the Constitution controlled instead depended upon the specific conditions of the territory. Thus to the question of whether “the Constitution followed the flag,” the answer became: not necessarily.\(^44\) These cases became an important set of precedents more than a century later in the habeas cases concerning Guantánamo. They also serve as a stark example of how America began to mimic its imperial mother England in dilemmas involving the application of the rule of law to imperial outlets.

Although the Progressive movement’s faith in national power translated into imperial indecencies abroad, along with the growth of the criminal justice system and alcohol prohibition, the movement also sought to protect the common man through the federal judiciary. At best, this meant the individual challenging his wrongful detention in federal court had an increasing number of judicial tools on his side to secure his release. Yet it also posed serious questions for the jurisprudence formed by courts whose powers emanated from an amended Constitution, numerous statutes, and common law predating the republic. Enhanced habeas access also did not result in liberty nearly as often as the writ’s celebrators might wish to believe.

If for no reason other than practical considerations, the federal courts struggled to determine what to review and what to leave to the state courts. The federal judiciary could not, as a purely logistical matter, question every state court proceeding on every imaginable ground. In this evolutionary experimentation, some precedents expanded the scope of federal review and other precedents effectively narrowed it.

**JURISDICTION AND DUE PROCESS**

For most of the early twentieth century, the federal judiciary was reluctant to overturn state convictions or otherwise undermine state-level criminal justice. A deaf American pleading for habeas corpus lost his 1906 case because the Fourteenth Amendment was not seen to have fundamentally altered the relationship between the federal courts and the states.\(^45\) Only infrequently did the federal judiciary intervene, and when it did it usually spoke highly of the importance of deference to the state system. While the federal courts began vindicating baseline standards of justice, not until mid-century did they explicitly hold states to the due process protections outlined in the Bill of Rights.

Long before the Supreme Court adopted its modern role of securing criminal justice protections against local police departments and judges, it found itself


\(^45\) *Felts v. Murphy*, 201 U.S. 123 (1906).
intervening to shield economic liberty from state regulation. Beginning in 1897 when
the Court struck down a Louisiana regulation banning foreign corporations from
doing business in the state and continuing with the watershed *Lochner* ruling that
overturned a New York regulation limiting work hours in 1905, the Lochner era
became defined by the Court’s new understanding that “substantive due process,”
as guaranteed by the Fourteenth Amendment, precluded state-level violations of
contractual freedom. Liberal scholars have long vilified this era, while others have
attempted to challenge the dominant view. Regardless, it is important to note that
the line dividing civil liberties and economic liberties is not always clear. When
James Clark McReynolds, writing for the Court in 1923, overturned a Nebraska law
prohibiting the teaching of German in public schools, he did so with the same
essential reasoning used in the *Lochner* cases, although scholars do not always cate-
gorize this decision as a Lochner-era case. More often, historians describe decisions
of the early New Deal Court, of which McReynolds was a conservative member, as
Lochner-era decisions, even though these challenges of Franklin Roosevelt’s federal
policies involved the doctrine of enumerated federal powers rather than overturn-
ing state-level action. In any event, most agree that the Lochner era ended in 1937
when the Court upheld a Washington state minimum wage law in *West Coast Hotel
Co. v. Parrish*. The doctrine of economic substantive due process came and went, and tradition-
ally defined “civil liberties,” particularly those in the Bill of Rights, did not come
to bind the states until well after the height of the Lochner era. In 1925, the First
Amendment protection of freedom of speech was incorporated. Criminal justice
protections came much later, after World War II and for the most part starting in
the 1960s.

Before these major revolutions in federal oversight of state criminal justice
occurred, however, the federal judiciary had to feel out its new role as a habeas arbiter
over the states. In the years before World War II, the Court grappled with issues such
as the relationship between certiorari and the exhaustion rule, the meaning of cus-
tody, and the extent to which it could review state proceedings *de novo*. The Court’s
actions in these areas had far-reaching implications for the modern era of habeas
corpus activism, as did a number of its landmark decisions, paving the way for a more
active federal judiciary. Yet at first, many of the post-Reconstruction developments

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46 *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).
50 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). This ruling overturned *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), which had struck down a federal minimum wage law on Fifth Amendment
grounds, although one could easily argue that federal minimum wage laws are unconstitutional on
one basis but states have a right to experiment with such laws free of federal interference.
The Power of Habeas Corpus in America

appeared very modest, and although in several key decisions the Court reached further than it had in the past into the realm of state proceedings, it did so with caution, and tended only to overturn state determinations in particularly egregious cases.

CERTIORARI AND APPEAL

The process of certiorari has had an intimate relationship with habeas since medieval England, when higher courts issued writs of habeas corpus cum causa combined with certiorari to check the detention of lower courts. These twin writs of certiorari and cum causa eventually gave way to habeas corpus ad subjiciendum. Today, the writs of certiorari and habeas corpus still share an intimate relationship, as sometimes a habeas corpus decision goes to the Supreme Court through the process of certiorari. Furthermore, certiorari and Supreme Court habeas corpus review have similarities, both constituting an independent review of a state determination on purely legal questions, or sometimes a mixture of legal and factual questions.

The two related writs have important distinctions. Certiorari brings a case to a higher court, which usually looks at the record as is. Habeas corpus proceedings, on the other hand, developed into a review of the case de novo. Certiorari orders go from the lower court to the higher court; habeas corpus writs are issued to the officer, or custodian, of the detainee.

In order to issue the writ of habeas corpus, the higher court must have appellate jurisdiction, although habeas corpus is not technically an appellate procedure, but rather a civil one. It is a civil suit, a collateral attack, to question the lower court’s process – but this takes on the character of an appellate process. Certiorari is an order to bring up the record. Habeas corpus is an order to bring forth the body.

These matters can be rather fluid, especially prior to the introduction of statutory limits and decades of jurisprudential precedent. In 1879’s Ex parte Virginia, the Court used the combination of habeas corpus and certiorari to mimic the function of the writ of error – a sweeping decree that the lower court, upon a final decision, to reexamine its own record. A black man, convicted by a jury that had excluded members of his race, presented to this court his petition for a writ of habeas corpus and a writ of certiorari to bring up the record of the inferior court, that he might be discharged, averring that the finding of the indictment, and his arrest and imprisonment thereunder, were unwarranted by the Constitution of the United States, in violation of his rights and the rights of the State of Virginia. . . . Held, that, while a writ of habeas corpus cannot generally be made to subserve the purposes of a writ of error, yet when a

52 For an early example of this in modern jurisprudence, see Ex parte Lange, 85 U.S. 163 (1873).
53 Hertz and Liebman, 28.
54 Hertz and Liebman, 330, 337.
55 Hertz and Liebman, 331–2.
prisoner is held without any lawful authority, and by an order which an inferior court of the United States had no jurisdiction to make, this court will, in favor of liberty, grant the writ not to review the whole case, but to examine the authority of the court below to act at all.\(^{56}\)

In the early twentieth century, the federal courts’ appellate jurisdiction over state trials as a matter of a mandatory writ of error began to shrink. Simultaneously, the discretionary power of federal courts to hear state cases certiorari began to swell. In 1914, Congress passed a law to replace direct appellate Supreme Court review as of right on a writ of error with a new provision that allowed state detainees seeking certiorari review on the grounds that their federal rights had been violated. In 1916, another law made review of state decisions regarding federal rights only reviewable through certiorari – unless the “authority” of the detention, rather than the constitutionality, was being challenged.

In 1925, yet another law defined all appropriate federal reviews of state decisions as certiorari reviews, except for “requests for review of state court decisions striking down federal or upholding state statutes under the Constitution.” As habeas corpus continued to become less available as of right, the reviewable questions through habeas corpus via certiorari became broader. Further, as the Court’s appellate docket began to reflect the new barrage of certiorari claims, the lower federal courts began adopting the federal judiciary’s statutorily designated duty of reviewing, as a matter of right, the constitutionality of state detentions.\(^{57}\)

THE MEANING OF CUSTODY

For the first century of U.S. habeas corpus, from 1789 to 1885, there was very little discussion of what “custody” meant. Traditionally, habeas checked the detention of persons not yet processed for trial. This tradition traces back to England, where the King’s Bench had quashed a writ in _Palmer v. Forsyth_ because no physical custody was involved.\(^{58}\)

As habeas became increasingly applied to post-conviction detainees in the nineteenth and early twentieth centuries, other questions arose as to what exactly constituted custody. In 1885, the Supreme Court heard the first case hinging on the definition of custody. In _Wales v. Whitney_,\(^{59}\) a Naval Officer awaiting court martial petitioned for a writ to challenge his confinement to Washington, DC. After it was dismissed, the appeal went to the Supreme Court, which ruled that he did not endure “physical restraint,” and, despite the compelling him to stay in the capital city, he possessed the free will to take a train out of town.\(^{60}\)

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\(^{56}\) *Ex parte Virginia*, 100 U.S. 339 (1879).


\(^{58}\) Duker, 295–4.

\(^{59}\) *Wales v. Whitney*, 114 U.S. 564 (1885).

\(^{60}\) Duker, 288–9.
By 1905, the federal courts started experimenting with looser definitions of custody. Judge Grosscup on the Seventh Circuit declared that “The purpose of the writ of habeas corpus is to test the right of the court, or other body issuing the writ of arrest, to restrain the party of his right to go without question or . . . without a string upon his liberty” (emphasis added).\footnote{Duker, 290.}

Such wording has the potential to broadly implicate any impingement upon one’s freedom. But the courts continued to apply limits with what might seem ad hoc reasoning. In In re Grice, the Third Circuit found that an alien out on bond awaiting deportation was not eligible for the writ, because the acceptance of the bond relinquished the privilege. In 1913, a district court used similar reasoning in Johnson v. Hoy to dismiss a claim from a petitioner claiming excessive bail. His payment of the bond meant “[h]e is no longer in the custody” of the state.\footnote{Duker, 290–1.}

In 1900, in Ex parte Baez,\footnote{Ex parte Baez, 177 U.S. 378 (1900).} the Supreme Court found that habeas was moot in cases where the persons were expected to be released by the time the writ could be processed. In a 1906 case, In re Lincoln,\footnote{In re Lincoln, 202 U.S. 178 (1906).} a prisoner whose sentence was soon to expire was also denied. Parker v. Ellis upheld this principle in 1960.\footnote{Parker v. Ellis, 362 U.S. 574 (1960).}

In Stalling v. Splain\footnote{253 U.S. 339.} (1920), Justice Brandeis asserted that habeas only applies in cases of “actual restraint.”\footnote{Duker, 291.} Not until the 1960s, in Jones v. Cunningham,\footnote{Jones v. Cunningham, 371 U. S. 236 (1963).} did the conservative definition of custody observed even through the progressive Brandeis court become thoroughly uprooted.

**JURISDICTION, LYNCH MOBS, AND DE NOVO REVIEW**

Up until the mid-twentieth century, when the federal courts began shifting emphasis to detainees’ “fundamental rights,” the judiciary adjudicated habeas cases involving state detainees primarily in terms of jurisdiction.\footnote{“Extradition Habeas Corpus,” 80–1.} Yet increasingly, the courts vindicated rights on the basis that the state courts had relinquished jurisdiction and thus their authority over prisoners. The most significant way the Progressive Era Court began using this jurisdictional test to defend the rights of detainees came
in the extension of habeas corpus relief to enforce the Due Process Clause of the Fourteenth Amendment. Although decades passed before the Court enforced the criminal justice protections guaranteed in the Bill of Rights, starting in the 1910s and 1920s the Court drew on baseline standards of fair procedure to send cases back to state court for reconsideration.

In 1912, the Supreme Court substantially expanded the scope of federal appellate review of what it saw as federal questions in state court proceedings. In particular, de novo review widened. As a corollary, fewer matters were considered “settled” in the interest of deference to the lower courts. Two new doctrines meant that de novo questions of fact became reviewable: “Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it” or “where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question to analyze the facts.”

Two cases, Frank v. Magnum and Moore v. Dempsey, revealed the significant expansion of federal habeas review. Although the two cases involve differences in reasoning widely discussed to this day, these two landmark decisions also shared a distinct continuity between them.

Leo Frank, a Jewish-American born in Texas and raised in Brooklyn, moved to a Jewish section of Atlanta to work at the National Pencil Factory. On a Sunday morning in April 1913, a call officer came upon a horrid discovery in the factory’s basement: the body of thirteen-year-old worker Mary Phagan, bruised, beaten, strangled, and murdered. After pursuing a few other possibilities, investigators pinned the blame on Frank. A trial convicted and sentenced him to death amidst a mob crying out to the jurors, “Hang the Jew, or we’ll hang you!” Frank petitioned on a writ of error, complaining that his trial had been conducted by a mob.

Writing for the Supreme Court, Justice Pitney denied habeas relief in Frank v. Magnum. He conceded that the trial was a sham, and that matters of mixed law and fact were indeed appropriately reviewable by the federal judiciary. But because the appeals process was free of mob intimidation, its vindication of the verdict could not be overturned. The Supreme Court could not properly challenge legal errors of this sort, but must instead defer to the state legal system when its appeal court appeared legitimate.

Frank had challenged the Georgia Supreme Court’s determination that the mob intimidation did not affect the outcome of his trial. Although this determination of fact is not controlled by the principle of res judicata—it was not beyond the bounds of further judicial inquiry—the Court still paid deference to the determination because other processes existed by which he could have sought remedy for this problem. The

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70 Hertz and Liebman, 61.
lower court’s determination of this question of fact – that the mob did not affect the outcome – did not in itself violate his due process rights.

Judge Oliver Wendell Holmes dissented, arguing that the distinction between law and fact was a muddy one. When fact and law are mixed together, he insisted the Supreme Court must look at the facts of the case, “otherwise, the right will be a barren one.”

In Frank, both the majority and dissent agreed on the exhaustion rule, that all the state and Supreme Court remedies (appeal on a writ of error and so forth) must be tried and failed before habeas corpus review would be available. There is an irony here. The Great Writ, which had started out, including in America, as a process to question one’s detention before trial, had come, in the hands of the federal judiciary, to apply to convicts who had tried every other method of being discharged, including the appeals process.

As a consequence of the ruling, Leo Frank had one more remedy to pursue: a commutation from the governor. The governor, convinced of Frank’s innocence, intended to commute his sentence, only to have his mansion stormed by a mob. The governor declared martial law to protect himself. The mob, including a former governor of Georgia, a judge, and several sheriffs, apprehended Frank and lynched him.

Considering the liberty and very life of Leo Frank, the federal courts failed him. An important principle concerning jurisdiction had arisen, however, that had major consequences in the future. When the Court denied Frank’s application, it expanded the concept of jurisdiction. Where state courts had plenary jurisdiction, the federal courts should give deference, but the meaning of due process widened to include questions as to the law’s constitutionally, the legality of the judicial process, the presence of proper notice, and the competency of lower courts.

States could lose jurisdiction, the Court concluded, in light of serious due process violations, and this matter would not only be relevant upon appeal. The Court agreed that habeas corpus was sometimes better for inquiring into certain questions than appeal. If the state appeals process proved inadequate – if it lacked “corrective process” to deal with such problems as a mob jury – then federal habeas corpus would be appropriate. The question still boiled down to jurisdiction and the bare-bones standards of due process, but Frank planted the seeds for an expansively growing federal habeas review power.

Eight years later, the Supreme Court granted relief to a black man with a similar claim to Frank’s. Moore v. Dempsey was the first twentieth-century case concerning blacks and the justice system in the South.

In 1919, race riots erupted in several cities, from Washington, DC, to Chicago. In Philips County, Arkansas, the Elaine Race riots began when about a hundred black

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73 Hertz and Liebman, 66.
74 For a very useful survey of the various interpretations of Frank and Moore, see Freedmen, 86–90.
sharecroppers faced off against hundreds of whites and federal troops, then resulted in up to two hundred deaths, the vast majority of them blacks. A trial plagued by mob intimidation convicted twelve blacks of murder. The state upheld the convictions without extensive investigation.76

Speaking for the Court, Justice Oliver Wendell Holmes cited Frank, adding that there was no corrective process available in this case. Although he argued that his decision was consistent with Frank, Moore v. Dempsey is widely seen as a departure. The facts were clear in both cases. Both petitioners sought direct appellate review and were turned down by the Supreme Court, and then denied habeas corpus relief in lower federal courts because the judgment keeping them detained had not been absolutely void, but was only suspect on due process and constitutional grounds.

But in Moore, the Court remanded the case back to the lower court to examine the “fact” of mob influence. Holmes wrote: “We shall not say more concerning the corrective process afforded to the petitioner than that it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts for himself when, if true as alleged, they make the trial absolutely void.”77 Justice McReynolds in his dissent argued that the lower district court had upheld the trial independent of the mob and pointed to a number of contemporary overturned convictions, so as to indicate that the state-level process worked. Foreshadowing future conservative concerns about comity and a flooded court system, McReynolds warned that the decision would hinder “prompt punishment.”78

Hertz and Liebman sum up the implications upon the development signified and kicked off by Moore:

On the federal prisoner side, Court’s recognition of a group of constitutional rights whose violation created exceptions to the otherwise preclusive exhaustion-of-appellate-remedies doctrine set off a second Golden Age of federal-prisoner review. The Court soon concluded, for example, that prisoners denied their newly recognized right to counsel could not be blamed for failing to pursue timely and complete appeals; that prisoners coerced into pleading guilty typically could not be understood to have thereby waived an appeal; and that prisoners convicted on the basis of government-tolerated perjury could not be expected to discover that fact in time to make it the basis of a timely appeal.79

After Moore, the Court continued to find Fourteenth Amendment rationales for overturning state cases and even state laws. In Fiske v. State of Kansas (1927), the Court found the state’s enforcement of the Syndicalism Act constituted “an arbitrary and unreasonable exercise of the police power” under the Fourteenth Amendment.80

77 Hertz and Liebman, 67.
78 Wert, Habeas Corpus in America, 131.
79 Hertz and Liebman, 67–8.
80 274 U.S. 380, 387.
In 1935, the Court remanded a case back to an Alabama court because it found the exclusion of black jurors qualified as a violation of federal rights. 81

Traditionally, the federal judiciary left questions of fact to the lower courts. The argument to begin reviewing the facts of state cases from the federal bench was that some questions previously considered questions of fact were actual legal questions. To allow lower courts authority, beyond federal review, over all questions of historical fact would effectively allow them to make law simply by defining facts in their own way. 82

The exhaustion principle became dominant in the debates and evolving jurisprudence surrounding federal habeas corpus for state prisoners. In the 1935 case Mooney v. Holohan, 83 the Court decided that federal habeas corpus would apply in a case where perjured testimony was purposefully used, but first, all state remedies to such state remedies had to be exhausted. 84

Two important habeas cases involving Nebraska’s justice system came down in 1941. In Smith v. O’Grady, the Supreme Court ruled that the Nebraska judiciary must issue a habeas corpus writ on Fourteenth Amendment grounds to “an uneducated layman [without] knowledge of law or legal procedure” who had “not been able to get counsel because of lack of funds” and “was tricked into pleading guilty to a serious offense.” 85 In Ex parte Hull, the Court decided that another Nebraska state prisoner could petition for a writ challenging his second conviction without challenging his first conviction when that second conviction would revoke the parole to which he was sentenced in the first conviction.

Meanwhile, federal review of federal convictions continued apace. The judiciary struggled with the question of how to reinforce Bill of Rights protections, at least indirectly, through habeas corpus. In 1938, the Supreme Court overturned circuit and district court rulings upholding a federal counterfeiting conviction. The Court determined in Johnson v. Zerbst that federal habeas corpus was the “only effective remedy” available to the prisoner who had been unaided by counsel, finding that the Sixth Amendment “withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.” 86 In 1941, the Court overturned in Walker v. Johnston 87 the conviction of a federal prisoner claiming a coerced guilty plea. The next year, Waley v. Johnson, 88 concerning a case where a federal law enforcer coerced a guilty plea, summarized the emerging principle of habeas’s accessibility: The Great Writ “extends also to those exceptional cases where the conviction has been in disregard

82 Hertz, 62.
84 Duker, 250–4.
of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.”

Habeas scholarship sometimes overlooks the dangers of federal law enforcement because so much of the discussion concerns the proper role of federal oversight of state proceedings. The modern judicial movement to expand habeas corpus has mostly been a nationalizing agenda. The movement that started with the Reconstructionists’ Habeas Corpus Act of 1867, when federal courts first gained habeas corpus authority over state convictions, has to this day favored a robust federal judiciary overlooking state-level systems worthy of skepticism. This is understandable, seeing as how the states after the Civil War have unreliably served individual liberty, to say the least. Even where habeas corpus has stifled federal law enforcement – such as with the Chinese Restriction Act – many can counter that the abuse was counteracted by a federal judiciary armed by the federal Burlingame Treaty, and that local officials shared guilt in the oppression.

While the early twentieth century featured mostly modest and self-conscious expansion of federal habeas corpus over state cases, the judiciary confronted several issues that had a significant impact on federal review of federal detentions as well as federal review of state detentions later in the century. The Court widened its conception of custody and lowered its threshold for undue state-level violations of rights. As the conditions, laws, and legal process changed – as the modern criminal justice system emerged and new constitutional rights were discovered or created – the federal courts adapted, struggling to strike a balance between the interests of the individual prisoner and traditional deference to state authority. As the balance shifted against the latter, some individual prisoners won their freedom from state abuses.

At the same time, the predominant political ideology of national supremacy and the nearly unrestrained power of the central state had ramifications not nearly as favorable to detainees’ rights. The Progressives of the early twentieth century and the modern “liberals” of the decades that followed championed a leviathan government that not only dispensed with the traditions of federalism that defined early American political history, but brought to life institutions in Washington, DC, that threatened individual liberty not just for criminal suspects and convicts, but for all Americans. The contemporary prison system, the state-level oppressions in parole, probation, juvenile justice, and prohibition – all persisting for years without sufficient judicial oversight – and the policy of U.S. imperialism abroad were logical extensions of both Progressive and modern liberal ideology and activism. This tension between trusting the national government as the primary guardian of individual liberty and the reality of consolidated power unchecked by rival power centers or decentralized legal authorities became crystallized in the great modern liberal crusade in the first half of the twentieth century: World War, wherein detainees’ rights to habeas corpus

89 Duker, 235.
were the last thing on most Progressives’ minds. Although national power had helped to secure the release of hundreds, maybe thousands, of people, the central state soon set disastrous precedents concerning the rights of those labeled enemies of the state. Among those deprived of habeas relief would be nearly a hundred thousand loyal American citizens rounded up without charge.
The Writ in World War

I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?

– President Franklin Roosevelt

In World War II, executive detention power escalated. The federal judiciary did little to interfere as President Roosevelt’s warfare state prosecuted alleged Nazi saboteurs by military commission, imposed martial law in Hawaii, and conducted Japanese interment. The failure of either political branch or the federal courts to effectively defend detainees’ rights – particularly those of more than 100,000 loyal Japanese-Americans – speaks to the delicate grip society has on its freedom, and how quickly power can win the day. The national government’s dismissal of individual rights during World War II brings into question its role as the chief guardian of its citizens’ freedom.

WILSON’S WAR AND CIVIL LAW

At the time, American entry into World War I was hailed as a democratic crusade against global tyranny, advertised as “the war to end all wars” and the “war to make the world safe for democracy.” Aside from a very dubious victory overseas that failed to materialize in a prolonged peace and freedom, but instead left behind conditions in which the Bolsheviks and Nazis rose to power as well as another World War, U.S. engagement also spurred a total restructuring of American society toward greater state control. Top income tax rates climbed above 70 percent, the newly created Federal Reserve pumped massive credit into the economy, thousands of new government

agencies arose, and American life became bureaucratized along the lines of central administration that later returned at peacetime in the New Deal. Furthermore, the Great War extensively undermined traditional civil liberties, as mere criticism of the U.S. government, its wars, and allies landed Americans in prison, surveillance of political activists became regular, and the government even deported hundreds of political radicals to Soviet Russia. The Anarchists Exclusion Act of 1918 attempted to block judicial review of deportation processes for political dissidents, but a 1939 Supreme Court decision later vindicated federal habeas authority over such cases.

In other areas of detention policy, America’s wartime government showed restraint. In 1918, Senator George Chamberlain, a Democrat from Oregon, proposed trying seditious civilians by military tribunals. Senator Frank Brandegee, a Republican from Connecticut, warned that such a proposal “simply bristles with constitutional questions and in my opinion is absolutely violative of every guaranty contained in the Constitution as to trial by jury and individual liberty.” Even President Woodrow Wilson, hardly a civil libertarian, wrote in a letter to Senator Lee Slaver Overman (D-NC) that he was “wholly and unalterably opposed to such legislation,” saying it was “not only unconstitutional, but that in character it would put us nearly upon the level of the very people we are fighting.” Assistant Attorney General Charles Warren, who likely penned the bill without the knowledge of Attorney General Thomas Gregory, resigned shortly thereafter.

Although on the one hand Wilson’s partial deference to habeas corpus and civil trials and simultaneous willingness to imprison people for dissent illustrate the limits of habeas in securing civil liberties for the detained, we should note the formal boundary that Wilson’s government refused to breach. Indeed, even a German spy, Lothar Witzke, who had entered through the Mexican border with a Russian passport, was not subjected to military trial. Because Witzke entered an area touched neither by military operations nor by martial law, Gregory found military commissions inappropriate. Drawing on Milligan, the Constitution, and Article 29 of the Hague Convention, Gregory believed that Witzke had not acted as a spy in the military sphere. In 1923, the German spy was sentenced to life of hard labor, then released to Germany.

In 1920, the Articles of War were revised to limit the president’s power over military tribunals. Despite that, this power expanded greatly in the next World War, establishing key precedents.

THE NAZI SABOTEURS AND MILITARY COMMISSIONS

In World War II, as in World War I, American life reorganized along centrally administered, statist lines, albeit to an even greater degree. In fact, World War II probably ushered in the most socialist, centrally planned economy and society America had ever seen or has yet to see. Forty percent of the economy was devoted to the war. Maximum tax rates skyrocketed to more than ninety percent. Rationing and price controls became the norm. The war effort dominated American society, as the nation went beyond New Deal controls to take on a nature that could plausibly be compared to fascism.8

As in World War I, American civil liberties deteriorated in the early 1940s. While free speech rights probably fared better than in Wilson’s War, World War II set new precedents for detention power and habeas corpus that remain relevant more than three generations later. The military commissions of World War II directly inspired those of the Bush era. Defenders of post-9/11 detention policy have often cited Roosevelt’s military commissions and the Supreme Court decision Ex parte Quirin as favorable precedents. John Yoo, whose advisory role in the Justice Department’s Office of Legal Counsel helped solidify the most extreme detention and interrogation policies of the Bush era, wrote in his 2006 book War by Other Means:

Quirin flatly declared that the government could detain enemy combatants regardless of whether they were citizens or not…. As if talking about al Qaeda itself, the Quirin Court said that “those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants.” Legally, the Padilla case is virtually identical to that of the Nazi saboteurs.9

In June 1942, eight German saboteurs came to the United States by submarine. The first one captured helped the FBI apprehend the other seven. The Germans had trained in both America and Berlin. They came to the States wearing uniforms and changed clothes upon landing. President Roosevelt created military tribunals, which soon found them guilty. They petitioned for a writ of habeas corpus through the civil court system. The case went to the Supreme Court, which upheld the tribunal’s jurisdiction over them10 in Ex parte Quirin.11

When the FBI interrogated them, the original plan was to use the civil courts. Officials promised a pardon to suspect George John Dasch for cooperating. He vowed to plead guilty with the understanding that he would face a civil trial. He felt

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9 John Yoo, War by Other Means: An Insider’s Account of the War on Terror (New York: Atlantic Monthly Press, 2006), 146.
11 Ex parte Quirin, 317 U.S. 1 (1942).
betrayed when he saw his picture in the Sunday paper, as he had wanted anonymity. He took back his promise to plead guilty and disclose all he knew in civil court.

The administration scrambled to avoid embarrassment. The FBI, which had already claimed credit, risked negative attention. Officials feared that the public would realize how easily a German U-boat might access America’s shores. To complicate matters, the German “saboteurs” had yet to commit sabotage. Attorney General Francis Biddle later noted in his memoirs that they had not gotten far enough in their plans to be guilty of attempted sabotage. And the statute against sabotage could only imprison them for thirty years. Top officials figured a civil court would sentence them to a maximum of two years.

Biddle and War Secretary Henry Stimson concluded that Roosevelt should create a military commission – quick, secret, favorable to the prosecution, and a process that would mean certain execution. Even though two of the Germans were naturalized U.S. citizens, they too would face a tribunal. Unlike with a traditional court martial, executive decree could govern most aspects of a military commission. Roosevelt wanted their heads. “Don’t split hairs,” he said to the attorney general.

Within a week of the Germans’ apprehension, President Roosevelt issued Proclamation 2561. It created a seven-man military tribunal “Denying Certain Enemies Access to the Courts of the United States.” Roosevelt claimed his authority on the basis of the Constitution and statute.\textsuperscript{12} Biddle and Army Judge Advocate General Major General Myron C. Cramer served as the prosecutors.

The administration intended the military commissions to circumvent due process safeguards. Biddle “believed that his proposed language would not represent a suspension of the writ of habeas corpus, although the wording ‘should produce the same practical result for such enemies.’” Franklin Roosevelt told him, “I won’t give them up. . . . I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?”\textsuperscript{13} General Frank R. McCoy was appointed as the tribunal’s president, and three major generals and three brigadier generals rounded out the court.

Roosevelt claimed he wanted a tribunal to enforce the laws of war but said that the Articles of War had constraints that would not apply in this case. The contrasts with a conventional court martial were stark: two-thirds of the court, rather than a unanimous agreement, could subject the defendants to death; the final decision would not be subject to anyone’s review but the president’s; and the tribunal had the power to overrule any complaint grounded in the Articles of War. The administration claimed the tribunals were secret to protect national security, but more likely it intended to avoid embarrassment for the FBI and to reveal that Dasch had cooperated with the agency to capture the other defendants. The defendants faced two charges – a violation of the “laws of war” and a conspiracy charge under the Articles of War.

\textsuperscript{12} Louis Fisher, \textit{Military Tribunals}, 95–8.

Kenneth Royall, a colonel in the U.S. Army, defended the accused. Roosevelt warned him to stay away from the civilian courts. Royall thought the military commission lawless and asked Roosevelt to change his order, but the president refused. Royall brought forth a case based on *Ex parte Milligan* that argued that the DC civil courts fully functioned and so the military commission violated the Articles of War. Before the District Court handed down a decision the case went to the Supreme Court. The Court included Felix Frankfurter, a former adviser to the president and a strong supporter of military commissions, and Judge James Byrnes, who had been an unofficial adviser to the administration.\(^{14}\)

Royall argued that the civil authority had proper jurisdiction over the case and that the commission had unconstitutional powers, whereas Biddle and Cramer argued that habeas corpus did not apply to such enemy aliens.\(^{15}\) Months before handing down its full decision, the Court denied habeas corpus *per curiam*, so as to allow the commissions to continue. The *per curiam* had not addressed whether the Court was delaying a decision upon Article 46 and 50\(\frac{1}{2}\) in anticipation of the tribunal and president’s actions.

In front of the commission, Royall stressed that the panel should proceed with the understanding that foreign tribunals will be used against Americans. Even in times

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15 Royall and his fellow attorney Colonel Cassius Dowell argued that the major legal issue was that most of these charges were cognizable in civilian courts, which were working at the time, and so the case should not be under executive jurisdiction. Moreover, there was no evidence the defendants had tried to get military information entered military property, and so these offenses were not covered by Article 81 and 82 in the Articles of War. There was no common law crime against the United States. There was no statute to cover what they had done, and the law of war and international law did not apply in the commissions case. Sabotage and espionage, as well as conspiracy, are statutory offenses and should thus be under civil court jurisdiction. What’s more, by essentially crafting increased penalties after the arrest, the president had violated the *ex post facto* clause of the Constitution. Taking it further, they argued that Roosevelt’s proclamation authorized the death penalty with only two-thirds of the commission voting in favor, a violation of Article 43 in the Articles of War.

Biddle and Cramer presented a typical, pro-executive supremacy rebuttal. They argued that the defendants could not sue in court because they were enemies of the United States. Their 93-page briefing argued that the defendants had no right to habeas corpus. “The great bulwarks of our civil liberties – and the writ of habeas corpus is one of the most important – was never intended to apply in favor of armed invaders sent here by the enemy in time of war.”

Unlike *Milligan*, which asserted that normal courts should be used where they are operating, this case concerned Germans, agents of a foreign enemy, wearing their native uniform. The Fifth Amendment guarantee did not cover the land or naval forces. With few peacetime exceptions, Great Britain had not extended habeas corpus to foreign enemy subjects. Biddle even argued that the commander in chief has powers that Congress could not check. (Biddle, arguing about all the differences with Milligan, later wrote erroneously in his memoirs that Milligan was decided “in 1876,” “a decade after the Civil War.”)

Royall argued that, under Article 38, the president was empowered to set the procedures for commission, but instead he delegated too much leeway to the commission, such as the decision of how to apply the Articles of War. Article 50\(\frac{1}{2}\) had guaranteed broad review of the commissions procedures, but instead Roosevelt had decreed himself the final arbiter. Without statutory authority, there was no actionable law of war, and so the case must go through the civil courts (Louis Fisher, 108–12, 120–1).
of war, he argued, the government must uphold its higher values. On August 1, the day after the Supreme Court upheld the power of the commission, all eight defendants were found guilty, to be sentenced to death. Six of them were executed exactly one week later.¹⁶

On October 29, the Supreme Court finally handed down the full opinion.¹⁷ The decision said the secrecy of the trial rendered it impossible to know whether the president’s order and proclamation violated the Articles of War. It did not address defendant Herbert Hans Haupt’s American citizenship and dismissed all concern for “any question of guilt or innocence of petitioners.” It upheld the right of the president to create the commissions without adjudicating on the executive’s potential violation of statute, finding it “unnecessary for present purposes to determine to what extent the president as commander in chief has constitutional power to create military commissions without the support of Congressional legislation.” Rather, Congress could neglect the specifics and leave the military commission process up to the “common law.” “Unlawful combatants” who enter America without their uniforms are not prisoners of war, the Court concluded, and can face military commission, regardless of citizenship. Under the laws of war, U.S. citizens engaging in hostilities against the nation, or associating with the military or an enemy state, are subject to tribunal.¹⁸ The Court outlined contrasts with Milligan. Milligan had not resided in the states in rebellion, was not an enemy combatant, and was not subject to punishment as an unlawful belligerent, but was actually a “non-belligerent.” The judges disagreed on the reasoning in their otherwise unanimous decision. Some of them believed the Articles of War did not apply to enemy invaders. Others believed the Articles did, and yet did not forbid Roosevelt’s commission.

The decision may have weighed heavy on the justices’ souls. Justice Hugo Black found uncomfortable the idea that anyone within the United States could fall under tribunal jurisdiction. Justice Harlan Stone regarded it “very difficult to support the Government’s construction to the articles” of war and found it “almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated.” He worried that more evidence might surface one day and make the Court look bad. Even Justice Frankfurter, an ardent supporter of powerful military commissions, wrote in an unpublished memo that “there can be no doubt that the President did not follow” Articles of War 46 through 53. But he believed the president had total authority, that judicial scrutiny would hurt America, and that the executed defendants were “damned scoundrels” and “low-down, ordinary, enemy spies” who had “a helluva cheek to ask for a writ that would take you out of the hands of the Military Commission.”¹⁹

¹⁷ Ex parte Quirin, 317 U.S. 1 (1942).
Frederick Bernays Weiner, a military law expert, wrote a stirring critique of the whole affair. He argued that Article 15 established concurrent jurisdiction between the tribunals and courts, meaning the courts could still scrutinize the tribunal. He found only one precedent for using the Army’s judge advocate as a prosecutor, a case that “no self-respecting military lawyer will look straight in the eye: the trial of the Lincoln conspirators.” In that case, the attorney general did not assist the prosecution. Even conservative Justice Antonin Scalia, dissenting in Hamdi sixty-two years later, said the decision in Quirin “was not this Court’s finest hour.”

After Quirin, civilian courts tried collaborators and accomplices with spies, just as the defense team in Quirin had demanded was appropriate. Then, in 1944, a second round of military tribunals tried two Germans, Colepaugh and Gimpel. They faced charges of violating the laws of war and the Article of War dealing with conspiracy. In this case, the Judge Advocates Office, rather than the president, reviewed the records. Biddle was not the prosecutor. Cramer reviewed the proceedings. Commanding generals, not the president, appointed the commissions. The Germans were sentenced to hang on February 14. President Truman commuted their sentences on May 8 at the end of the European war. Gimpel was deported back to Germany and Colepaugh, having tried petitioning for habeas corpus from prison on the grounds of an unjust tribunal, was paroled in 1966.

Foreign nationals in the sphere of the war also faced military commissions. Here, too, controversial cases laid down precedents that continue to affect military law. Some of these cases became important focuses in the Supreme Court’s habeas rulings after 9/11. In 1946, the Supreme Court upheld a military commission conviction for a Japanese military leader found culpable for war crimes committed by his inferiors.

22 Louis Fisher, Military Tribunals, 126.
23 Louis Fisher, Military Tribunals, 128.
24 Yamashita, a Japanese military leader whose men conducted brutal atrocities in the Philippines, was convicted by a military commission created by Douglas MacArthur for negligently allowing these war crimes. He was sentenced to hanging. The U.S. Supreme Court upheld his tribunal 6–2 on the grounds that the laws of war were in effect and so a commission was appropriate. Justice Stone dismissed arguments that standard rules of evidence should be involved, as is promised by Article of War 38, because this trial was a “laws of war” tribunal.

Justice Murphy dissented on the grounds that the Due Process Clause of the Fifth Amendment was violated, because it applied to “any person” accused of a crime under U.S. federal jurisdiction. He said Yamashita was rushed to trial on a bad charge and had inadequate time to construct a defense. His summary sentence for war crimes was unfair because he had no control of the atrocities committed by his men, since his control over them had been disrupted by U.S. forces: “Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice, or to military reality” (In re Yamashita, 327 U.S. 1, 35 [1946], Murphy dissenting). Justice Rutledge also dissented, on the grounds of the rules of evidence and the Articles of War 25 and 38, which he said applied to all military tribunals, as well as a violation of the 1929 Geneva Convention. Tomoyuki Yamashita was hanged on February 23, 1946.
Two justices, Murphy and Rutledge, dissented from the *In re Yamashita* decision, as they did the same year in *Homma v. Patterson* on the grounds that General Honna, found guilty of bombing open cities, leading the Baraan Death March, and abusing POWs, had been denied habeas corpus. The Court continued to scrutinize military commissions conducted abroad both during and after the war.

In 1950, the Court handed down its opinion in *Johnson v. Eisentrager*, which in 2004 became an instrumental case citation for the executive supremacists on the Supreme Court defending Bush’s detention policy. Petitioners were nonresident enemy aliens who had been tried and convicted under the laws of war in China. The DC Circuit Court ruled that anyone deprived of liberty by the U.S. government who could demonstrate a violation of their constitutional rights was eligible for a writ of habeas corpus, because the Fifth Amendment protected all “persons,” not just citizens. The appellants did not have to reside in the United States. Justice Jackson, speaking for the Court, concluded that giving immunity or protection to enemies from such military trials would be inconsistent with the treatment offered to American citizens and aliens abroad:

Can there be any doubt that our foes would also have been excepted but for the assumption “any person” would never be read to include those in arms against us? It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies. And, of course, it cannot be claimed that such shelter is due them as a matter of comity for any reciprocal rights conferred by enemy governments on American soldiers.

The decision below would extend coverage of our Constitution to nonresident alien enemies denied to resident alien enemies. The latter are entitled only to judicial hearing to determine what the petition of these prisoners admits: that they are really alien enemies. When that appears, those resident here may be deprived of liberty by Executive action without hearing.

Justices Black, Douglas, and Burton dissented, warning that it was a “broad and dangerous principle” that those convicted, sentenced, and incarcerated had no legal

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26 In 1948, the Supreme Court ruled it had no jurisdiction over the International Military Tribunal for the Far East, created by General MacArthur, because it was not a federal tribunal. Murphy dissented. In 1950, U.S. citizen Simon Nash, petitioned for writs of habeas corpus on behalf of seven nationals convicted of war crimes in military tribunals. He also wanted *in forma pauperis* status, meaning financial assistance for his poverty. A U.S. District Court rejected his claim (*Hirota v. MacArthur*, 338 U.S. 197 [1948]).

27 In 1946, a U.S. citizen, Gaetano Teerito, who had been captured in Sicily in 1943 while serving under the Italian Army and wearing the uniform while trying to escape, petitioned for a writ of habeas corpus as he was being held as a POW in California. The Ninth Circuit Court ruled that his status as a POW was legal under the Geneva Convention. Citing *Quirin*, it determined his citizenship was no protection. He was denied habeas corpus; although hostilities with Italy had ceased and the nation was now an ally, there was no treaty of peace between the countries (*Fisher, Military Tribunals*, 154).


The Writ in World War

rights. It was “wholly indefensible . . . to deprive the federal courts of their power to protect against a federal executive’s illegal incarceration.” Black believed habeas corpus applied “whenever any United States official illegally imprisons any person in any land we govern.”

From 1952 to 1960, the Court placed limits on the reach of military commissions on matters pertaining to former personnel or dependants and relatives of active personnel abroad.

MARTIAL LAW IN HAWAII

On the eve of U.S. entry into World War II, anticipating confrontation with Japan, Hawaii adopted emergency legislation vastly empowering its governor, General Joseph B. Pointdexter, in the event of war. The governor signed the Hawaii Defense Act on October 3, 1941, more than two months before the attack at Pearl Harbor, giving himself “unprecedented powers.”

On the day of the attack at Pearl Harbor, Governor Poindexter did not invoke the Act passed for this very contingency, but instead declared martial law, putting all power, including the judicial power, in the hands of the commanding general, Lt. General Walter C. Short of the Hawaii department. A military government was established, with Lt. General Short, and later his successors, Gen. Delos C. Emmons and Gen. Robert C. Richardson, Jr., issuing the orders of how to run the territory. Short was asked to prevent invasion and suspend habeas corpus.

Military commissions and provost courts appeared. These courts could mete out five years of prison and even the death penalty. Under Section 67 of the Organic Act from 1900, the governor had the power to suspend habeas corpus and impose martial law in part or all of Hawaii, but only in cases of “imminent danger” of invasion or rebellion, and only “when the public safety requires it.”

Attorney General Biddle secretly urged President Roosevelt to facilitate a compromise whereby military law would persist but the civilian authority would regain control of “food supply and distribution, commerce, communications, traffic, hospitals and health, O.P.A., civilian defense, liquor, gasoline rationing, and fiscal matters.” A delegation went to Washington, DC, in December 1942, one year after the attack, pleading for the restoration of civil rule on the islands.

At first, the military exerted total control of the island but eventually eased its grip. After the Battle of Midway, Governor Stainback, upon taking office in August 1942, moved to restore some civil functions to the Hawaiian courts. They regained their authority over criminal prosecutions and civil litigation. On February 8, 1943, Governor Stainback and Military Governor Emimons issued a proclamation declaring

31 Louis Fisher, Military Tribunals, 156–60.
33 Rankin, 214; Louis Fisher, Military Tribunals, 131, 134.
that civil authorities would regain control beginning on March 10. However, a modified form of martial law persisted: “[A] state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended,” the proclamation announced. Criminal prosecutions and civil suits against military officials and prosecutions for violating military orders still fell under military law, although the commanding general could waive the last exception. A dual legal system now existed. Civil authorities had jurisdiction over everyday civil life. The military maintained control over military questions. On March 10, 1943, a dramatic and flowery ceremony ostensibly marked the return of power back to civil authorities. But the military continued issuing general orders.

Military law required the suspension of habeas. Before March 10, a case had come to the Federal District Court in Honolulu challenging the martial law. Clara Zimmerman had petitioned for a habeas corpus writ on behalf of her husband on February 19, 1942, challenging the validity of his military confinement without charge. Judge Delbert E. Metzger found himself with the legal mandate of issuing the writ, but the military governor barred him from doing so. He declined to issue the writ, noting that habeas was suspended. On December 14, 1942, the Ninth Circuit affirmed this denial of habeas corpus, citing Section 67 and describing the courts as “ill apt to cope with an emergency of this kind.”

The Ninth Circuit appealed to necessity:

It is common knowledge that the Hawaiian Islands, owing to their position and the inclusion in their population of so large an element presumptively alien in sympathy, are peculiarly exposed to fifth-column activities. In such an exigency, a prime purpose of the suspension of the writ is to enable the executive, as a precautionary measure, to detain without interference persons suspected of harboring designs harmful to the public safety. The civil courts are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges. Their province is to determine questions of guilt or innocence of crimes already committed. In this respect their functions are punitive, not preventive; whereas the purpose of the detention of suspected persons in critical military areas in time of war is to forestall injury and prevent the commission of acts helpful to the enemy. It is settled that the detention by the military authorities of persons engaged in disloyal conduct or suspected of disloyalty is lawful in areas where conditions warranting martial rule prevail. Measures like these are essential at times if our national life is to be preserved. Where taken in the genuine interest of the public safety they are not without, but within, the framework of the constitution.

Judge Bert Emory Haney dissented, arguing that Articles I and II did not empower the federal government to establish a “military government anywhere.” Haney argued that the courts had competency to adjudicate the “necessity” of military law. The

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34 Rankin, 214–8; Louis Fisher, Military Tribunals, 132–5.
35 Rankin, 215–8.
36 Rankin, 218–9; Louis Fisher, Military Tribunals, 132–5.
alternative, he said, would be an executive branch that could simply declare emergency and lock up anyone it wanted in the judicial and legislative branches, thus “effectually abolishing the Constitution.” Haney noted that the government conceded in oral arguments that Zimmerman had not been charged with violating “the Constitution, a statute of the United States, a statute of the Territory of Hawaii, the Articles of War, the Law of War, any order of the President, the Secretary of War, the Military Governor or any other commanding officer.” Because the detainee was eventually freed, the Supreme Court regarded the matter settled and did not grant certiorari.

Some have compared this episode in American history to the conflict between Andrew Jackson and Judge Hall during the War of 1812. One Hawaii case in particular concerned two naturalized citizens of German descent held in military custody shortly after Pearl Harbor. Naturalized in 1936, Walter Glockner came to Hawaii the year after. Erwin Reinhold Horst Heifert arrived with his parents in 1926. Military authorities ordered them confined. The captives hoped that with the restoration of civil law in Hawaii they might be released. Judge Metzger issued their habeas corpus writs on August 16 and they were served on August 20.

According to the judge’s reasoning, habeas corpus was still to be respected and its suspension was illegitimate: Although “a state of war exists . . . that is not sufficient to authorize the suspension, and the governor’s proclamation clearly manifests that in his executive judgment civilian government functions and laws he so ordered.”37

When General Richardson did not come forward with his prisoners, Metzger cited him. District Attorney Taylor asked if he could read a statement on behalf of Richardson, but Metzger said no. The violation of the writ – the order that he bring forward the prisoners – was enough by itself to warrant citation, Metzer insisted. The statement reassured the judge that Richardson would file a return to the writ, but asserted that the civil judge’s jurisdiction did not apply to this military custody. When Richardson refused to appear, Metzger fined him $5,000. Taylor gave notice that an appeal would be forthcoming.

On behalf of the military governor’s office, Colonel Eugene V. Slattery presented a copy of a general order prohibiting civil judicial interference with military personnel in their work. The second part of the order prohibited habeas corpus in any civil court in Hawaii. The order specified Metzger by name and ordered that all legal action on Glockner and Seifert cease and all pertinent court records be destroyed. He was to “refrain from . . . all pending habeas corpus proceedings” under threat of trial in provost courts or by military tribunal.

The military government argued that that Hawaii was a war zone, and the suspension of habeas corpus was essential for U.S. security. It would compromise the whole system to allow even one internee to have habeas corpus proceedings. Secret war

37 Rankin, 220–1.
plans would emerge in civil court. National security absolutely required deference to the military authority. Civil government in full would endanger national security.

Attorney General Biddle sent Edward J. Ennis, the chief of the alien control unit of the Department of Justice, to negotiate a compromise. General Order 38 was issued, rescinding General Order 31. Ennis told Metzger that the internees would be freed, and Americans of German extraction would be sent to the mainland United States. Richardson’s fine was lowered to $100 and the habeas corpus demand was tabled. Instead of reimbursing Richardson, as the federal government did for Andrew Jackson for his scuffle with Judge Hall, President Roosevelt issued an unconditional pardon to Richardson.

In another case, a military provost court tried Harry White for the crime of embezzlement on August 25, 1942. No appeal was allowed. U.S. District Judge Frank McLaughlin ruled that the process violated White’s Fifth and Sixth Amendment rights. Citing both *Milligan* and *Quirin*, he argued that courts have the duty, even at wartime, to protect civil liberties, and that Poindexter did not have the legal power to transfer judicial authority to the military. He granted White habeas corpus and had him discharged.38

The tension between the military law and civilian law in Hawaii appeared in other cases. Before the Battle of Midway, Fred Spurlock, a black American, was sentenced to prison for assaulting a police officer, and then parole and, after another offense, hard labor. In this case, McLaughlin ruled that the provost court had no authority to charge him and overruled the conviction. The Ninth Circuit reversed his decision in *per curiam*. Richardson pardoned Spurlock.

In dealing with a shoplifter named Duncan in Honolulu, Judge Metzger ruled that civilian courts, not military law, should govern such cases. He argued that if the laws were insufficient to defend America from the Japanese, the military should request that Congress remedy the deficiency through legislation “instead of insisting upon holding by force of arms an entire population under a form of helpless and unappealable subjugation called martial law or military government. . . .” He denied that martial law controlled any more, given the 1943 Proclamation. The Ninth Circuit Court reversed the decision on this case, as it had with White’s case, finding habeas’s suspension ongoing and the courts to be acting in accordance with military priorities. It argued that a criminal trial by civilian courts would require the intolerable consequence of including Japanese-Americans on the juries.39

The Supreme Court granted certiorari on the cases of Duncan and White, handing down its decision after the war ended. It took issue with the Justice Department’s claim that Section 67 granted “armed forces extraordinarily broad powers to try civilians before military tribunals.” Congress did not clarify or define martial law or designate the degree to which the military could run the legal system. The Court

found the Organic Act constitutional, but found no proper presumption for such broad martial law powers, and criticized the “mistaken premise” that Hawaiians had less constitutional protection of their rights than U.S. citizens.

Paradoxically enough, Robert Rankin argues that Hawaii’s martial law was actually healthy for the Constitution, allowing for more order and liberty than an ad hoc approach. “Blackouts, curfew laws, and the establishment of relocation camps for American citizens of Japanese ancestry are illustrative of the regulations established without a resort to the declaration of martial law.” In *Hirabayashi v. United States*, the Supreme Court upheld a military curfew order in the Western Defense Command on the grounds of Executive Order 9066 and Congress’s ratification on March 21, 1942. “Strict regulation of civilian life during war time can be obtained without the use of martial law.”

Rankin points out that habeas corpus has to be suspended for martial law to endure, and the officers in charge of administering martial law are in a position to know when it should end, whereas a less deliberately crafted legal regime, such as with Japanese Internment, is more indefinite and unpredictable. But this begs the question and excludes the middle. Why is martial law necessary at all, and why are the only alternatives for a civil society governed by constitutional law either martial law, complete with a suspension of habeas corpus? On the other hand, why are extreme violations of civil liberties without an official declaration of martial law or a suspension of habeas corpus defensible? Could not the Court been wrong in *Hirabayashi*? Could it not be the case that both official martial law and such programs as Japanese Internment have no compatibility with the Constitution?

**JUDICIAL DEFERENCE TO AMERICAN CONCENTRATION CAMPS**

Long before Pearl Harbor, in June 1940, the FBI launched its Custodian Detention Program, creating a list of people to detain in the event of an emergency. The night of the Pearl Harbor attack, December 7, 1941, the government brought into custody those deemed most dangerous. This included 770 Japanese nationals on the Custodian Detention list. In the subsequent months, more than nine thousand enemy aliens were also detained, including about 5,100 Japanese, 3,250 Germans, and 650 Italians. Attorney General Biddle assured that these detentions involved specifically targeted persons and did not result from “dragnet techniques.” Each individual had a hearing in front of an Enemy Alien Hearing Board. Over the next several years, almost two-thirds were released.

After Pearl Harbor, the government also detained a total of around 890,000 “enemy aliens.” President Roosevelt stripped them of their freedom of movement and their

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41 Rankin, 227.
right to possess radios, cameras, weapons, and other items. In October 1942, these restrictions were lifted from the 600,000 Italians who constituted the bulk of the aliens detained.\textsuperscript{42}

The Japanese aliens – and the American citizens of Japanese descent – did not have it so easy. On February 19, 1942, President Roosevelt issued Executive Order 9066, ordering the military to establish military districts within the United States out of which it could exclude “persons” and relocate them to military internment camps. The word “Japanese” did not appear in the order, but everyone understood they were the targeted group.

In the eight months that followed, the federal government forced 120,000 individuals of Japanese extraction, two-thirds of them American citizens, to abandon their homes in California, Washington, Oregon, and Arizona. There were no charges, no hearings, no explanations, given to them of where they were going, for how long, or under what conditions. They were allowed to bring only what they could carry on their persons, and many of them lost everything they had.

Officials corralled them into “detention camps” converted from racetracks and fairgrounds. They lived in horse stalls and became subjected to barbed wire and armed guards on watchtowers. They were then taken to permanent internment camps in isolated areas, where they languished under military rule for three years. “All this was done even though there was not a single documented act of espionage, sabotage, or treasonable activity committed by an American citizen of Japanese descent or by a Japanese national residing on the West Coast.”\textsuperscript{43} Indeed, new revelations show that Roosevelt’s Solicitor General Charles Fahy deliberately withheld from the Supreme Court and the public a report conducted by the Office of Naval Intelligence concluding that West Coast Japanese-Americans posed no military threat to the United States whatsoever.\textsuperscript{44}

In two key legal challenges, the Supreme Court upheld these wartime policies against Japanese-Americans. The first, \textit{Hirabayashi v. United States},\textsuperscript{45} decided on June 21, 1943, upheld the Japanese curfew law. Gordon Kiroshi Hirabayashi was an American citizen, born in Seattle in 1918 to Japanese parents who never returned to their home country, educated in public schools, and enrolled as a senior at the University of Washington at the time of his arrest for violating the curfew order. The commander of the Western Defense Command, under authority of Roosevelt’s Executive Order 9066, directed all Italian and German aliens and all Japanese, U.S. citizens or not, within a military area to “be within their place of residence between the hours of 8 p.m. and 6 a.m.” Violation of the curfew order was a misdemeanor.


\textsuperscript{43} Stone, 286–7.

\textsuperscript{44} “U.S. official cites misconduct in Japanese American internment cases,” \textit{Los Angeles Times}, May 24, 2011.

\textsuperscript{45} 320 U.S. 81 (1943).
Delivering the unanimous opinion of the Court, Chief Justice Stone affirmed the conviction, concluding that Congress had ratified the Executive Order on March 21, 1942, that Congress and the president had the constitutional authority to give the order, that the military command legitimately worried about a Japanese invasion, that the order did not unconstitutionally discriminate against Japanese-Americans, that violations of liberty do not constitute illegal actions by the government, and that Congress had not unconstitutionally delegated the power to the military commander.\textsuperscript{46} Hirabayashi is discussed in full in Appendix A of this book.

The next year, the Supreme Court handed down its Korematsu\textsuperscript{47} decision on December 18, 1944, upholding Executive Order 9066 itself. Fred Korematsu was an American citizen of Japanese descent who knowingly violated Civilian Exclusion Order No. 34, choosing instead to remain where he lived in San Leandro, California. He was charged with violating the order, and defended himself on the ground that Executive Order 9066 violated the Fifth Amendment. He was convicted by a federal district court, whose decision was upheld by the Circuit Court of Appeals. The case came before the Supreme Court on certiorari, which decided 6 to 3 on December 18, 1944, to uphold his conviction as well as the Executive Order.

Justice Hugo Black, writing for the Court, found the exclusion order constitutional, citing the necessity of national security. He denied that Korematsu’s exclusion had resulted from racism, but rather from the exigencies of war with Japan. He found that the questions raised in Korematsu should follow the same principle decided in Hirabayashi – deference to Congress and the military. The Court focused on exclusion and refrained from ruling on other orders concerning Japanese Internment. Justice Frank Murphy issued a strong dissent, crediting the policy to racism repugnant to the Constitution’s due process protections. An analysis of Korematsu follows in Appendix B.

On the same day as Korematsu, the Court also issued its unanimous opinion on Ex parte Endo,\textsuperscript{48} upholding the habeas corpus rights of an American citizen subjected to Japanese Internment, yet with the majority essentially defending the overall internment program consistent with its position in Korematsu.

In 1942, under military orders springing from Executive Order 9066, Mitsuye Endo, an American citizen of Japanese ancestry, was evacuated from Sacramento, California, and removed to the Tule Lake War Relocation Center in Newell, Modoc County, California. In July of that year, she petitioned for a writ of habeas corpus in the Northern District of California District Court. The Court denied her petition a year later and the appeal went to the Circuit Court of Appeals the next month. She was then taken to the Central Utah Relocation Center at Topaz, Utah, where she remained as the Supreme Court considered her case.\textsuperscript{49}

\textsuperscript{46} 320 U.S. 81, 91–104 (1943).
\textsuperscript{47} Korematsu v. United States, 323 U.S. 214 (1944).
\textsuperscript{48} Ex parte Endo, 323 U.S. 283 (1944).
\textsuperscript{49} 323 U.S. 283, 284–5 (1944).
Because the government conceded that Endo was a “loyal citizen,” and because her continuing detention despite that designation of loyalty fell under the civilian control of the War Relocation Authority, rather than by military order in accordance with the need to prevent espionage and sabotage, the Court unanimously determined that Endo must be afforded her constitutional rights and released. The Court further considered whether the attitude of Americans uneasy about her moving into their community excused the government’s continuing detention. Finally, the Court ruled on the jurisdictional question of whether her relocation to Utah nullified her habeas corpus proceeding, which had begun when she was detained in California. A full discussion can be found in Appendix C.

California Attorney General Earl Warren supported Japanese Internment but later in 1962 wrote in “The Bill of Rights and the Military” that the mere fact that the Court had ruled in *Korematsu* “that a given program is constitutional, [it] does not necessarily answer the question whether, in a broader sense, it actually is.” Interestingly, Warren eventually became instrumental in the federal broadening of habeas corpus.

Thus it was that even in the absence of martial law on the American mainland, even without formal suspension of habeas corpus either by Congress or the president, the forced relocation and detention of 112,000 Japanese-Americans, most of them U.S. citizens, none of them actually charged with a crime, became ratified by the U.S. Supreme Court in *Korematsu*. Also it was, with *Endo*, that even when the Court confronted a particularly egregious case of an American citizen deemed loyal and officially free to go but detained nevertheless, the Court concluded she had a right to habeas corpus and her freedom, but the majority still bent over backward to defend the internment program. Nothing quite like this has happened again in the United States, but the Court remains, presumably with the strength of precedent, for future generations.

As Rankin points out in his paper on martial law in Hawaii, the Court upheld Executive Order 9066 even outside the context of martial law, which at least can be reversed without having as permanent an impact as the de facto control of civilian life. If habeas corpus and civilian law do not preclude detention camps for a whole race of people, perhaps there is a disturbing truth here. Given that the highest court in America, 6 to 3, ratified the mass detention of 112,000 innocent people, does the power of the judge to question detention really guarantee anything at all? The concluding chapters address such questions.

During World War II, the principles of habeas corpus took a major beating. Several models of U.S. policy, all of which compromised the civil liberties traditionally recognized at peacetime, demonstrated the fickle nature of the protection of habeas corpus. Even as federal habeas corpus widened to protect individuals against state court injustices, the federal government itself went on a rampage against constitutional

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The Writ in World War

protections, and the federal judiciary legitimized most of the abuses. Hawaii had martial law. In the case of the German saboteurs, the Supreme Court allowed the Roosevelt administration to condemn men to death, including at least one likely American citizen, all on the executive’s say-so, despite the precedents of civil law. In the interment policy for Japanese-Americans, the Court upheld the deprivation of liberty as a general matter even though it formally upheld habeas guarantees in *Ex parte Endo*. All of these different approaches to eroding the rights of the detained relied upon different legal reasoning, and all of them exposed the limits of the nationalized habeas regime in protecting those rights at wartime.

A warfare state fueled by national emergency is at least as deleterious to due process as is any small-town courtroom. The federal judiciary revealed itself as an unreliable defender of detainees’ rights, especially under federal authority, and yet it had emerged as the principal protector of individual rights against federal detention with *Tarble’s Case*. Nor, when it most mattered, was the federal executive branch, which enjoyed massive expansion in power in the eighty years between the Civil War and World War II, any better than the local oppression the federal government claimed to curb with the habeas oversight powers granted during Reconstruction and afterward. World War II stands as a reminder that the centralized state, even with an emboldened centralized judiciary, hardly serves as a consistent bulwark against detention abuses or a trustworthy friend of individual rights.
Federal Activism and Retreat

Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

– Jones v. Cunningham, 1963

As World War II’s cases found resolution, federal habeas corpus controversies refocused on the scope of federal review of state detentions. Scholars have often broken the modern era of federal habeas review into distinct eras based on Court politics – the Warren Court’s broadening of federal scrutiny over criminal proceedings, including its incorporation of Bill of Rights protections against the states; the Burger Court’s supposedly more moderate habeas findings; and the Rehnquist Court’s conservative trajectory toward deference to state convictions. Late-twentieth-century habeas debates culminated in the Anti-Terrorism and Effective Death Penalty Act, a major codification of conservative habeas reform proposals pushed through the Republican Congress in the wake of the Oklahoma City bombing, signed by the Democratic president, and upheld by the Supreme Court. The tendency of the central state to exercise power over state proceedings while shrinking the effective scope of habeas and finding reasons in the vast majority of instances to uphold convictions only highlights habeas’s limits as an effective remedy operating amidst and influenced by power dynamics. The incredible expansion of the criminal justice system in the late twentieth century also serves as an ironic juxtaposition.

In the postwar era, the balance fluctuated between respect for state determinations and federal power with an eye toward individual rights. But just as with World War II, this balancing act involved a utilitarian calculus. In some ways, protection of the individual became a priority of the national interest. In other respects, protection of the individual became weighed against the practical concern that excessive federal

1 371 U.S. 236, 243.
scrutiny would burden the court system, a reality that posed difficulties for those who wanted to see the federal government ensure justice. Also at issue was the concept of respecting state jurisdictions for the sake of the legal system’s stability. The balancing games that transpired over the next several decades indicated the federal judiciary’s institutional boundaries as the main predictor of habeas review.

Near the end of the war, a landmark case established a new equilibrium. In the 1944 case *Ex parte Hawk*, the Court set forth a new approach to the exhaustion principle. The decision had three important conclusions: consistent with precedent, an applicant for the writ must exhaust all state remedies before going to the federal court; he must also first go to a district court before petitioning for redress from the Supreme Court; and, perhaps most important, the traditional principle that federal scrutiny should only commence “in rare cases where exceptional circumstances of peculiar urgency are shown to exist” did not apply to proceedings “in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.”

As the courts felt their way through the principles of review on a nearly ad hoc basis, Congress jumped in to set them down in law. Congress codified the judicial practice as it had been unfolding in its Judicial Code of 1948. Title 28, Section 2254, provided new rules for federal habeas review of state convictions and Title 28, Section 2255, established a streamlined collateral review of federal convictions to serve as a habeas substitute, although for a while federal prisoners continued to favor the traditional 2241 habeas applications.

The new law made all constitutional claims cognizable – now the Court had congressional approval to scrutinize any question on the basis of federal constitutional rights – and affirmed the exhaustion of remedies as a necessary precursor to review by the highest court. This Act was said to merely be declaratory, simply describing the law as it was being practiced, yet two years later the Court described the Act as having codified the principles set forth in *Ex parte Hawk*.

However, the legislation also expressly declared that the exhaustion requirement included certiorari to the Supreme Court. In this way, it went beyond the formalization of *Hawk*, which concerned the exhaustion of state remedies and the writ of error from the Supreme Court. Further, the denial of certiorari, a discretionary writ, does not generally carry the legal significance associated with the denial of other remedies. Congress had done more than give force to federal case law; it statutorily circumscribed federal habeas.

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3 28 USC 2255.
4 “To the disappointment of reformers, in the first eleven months after its passage, only 102 applications under Section 2255 were filed” (King and Hoffman, 111).
6 Duker, 207.
7 Duker, 206–7.
The same year, in *Wade v. Mayo*, the Court, deviating from the codified principles of the 1948 Judicial Code, ruled that a petitioner was eligible for habeas corpus relief from a lower federal court even if he failed to file for a writ of certiorari with the Supreme Court. Justice Murphy, delivering the opinion, focused attention on the two relevant questions:

(1) whether it was proper for a federal district court to entertain a habeas corpus petition filed by a state prisoner who, having secured a ruling from the highest state court on his federal constitutional claim, had failed to seek a writ of certiorari in this Court;

(2) whether the federal district court correctly held that the prisoner had been deprived of his constitutional right to counsel at the trial for a noncapital state offense.

Justice Reed’s dissent demonstrated a general reluctance toward federal habeas corpus activism as well as a stricter interpretation of the exhaustion principle, which he defended on the grounds of precedent in *Ex parte Hawk*. “Today, the Court both limits and confuses the doctrine of exhaustion of state remedies so clearly expounded in *Ex parte Hawk*.” He goes on to defend a broader principle:

Litigation of this category offers the best example of the general principle of federal habeas corpus restraint. The insistence that state remedies be exhausted is but a concise statement of the proposition that state courts must, in all but the most exceptional cases, be the forums in which all the problems incident to a state criminal prosecution are to be answered.

Where a state offers an adequate remedy for the correction of errors in criminal trials, that remedy must be followed. Where there is a denial of constitutional rights by the highest court of a state, a remedy exists by direct review in this Court. An accused should not be permitted to reserve grounds for a habeas corpus petition in federal courts which would have furnished a basis for a review in regular course in the state court – not even when those grounds are that the accused was denied a constitutional right by a state court subject to reversal by a higher state court.

Also in 1948, a habeas corpus case made way for the incorporation of two important criminal justice protections in the Sixth Amendment. The Michigan State Supreme Court had denied habeas relief to a petitioner imprisoned for contempt of court. The Supreme Court granted certiorari incorporating the Sixth Amendment right to a public trial. This foreshadowed future instances of the Supreme Court using habeas corpus proceedings to define criminal justice protections and enforce them against the states.

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9 334 U.S. 672, 674-5 (1948).
Two years later, in *Darr v. Burford*, the Court retreated somewhat from its principles in *Wade v. Mayo* and stood by the principles of *Hawk* and the 1948 Judicial Code. The Court affirmed a district court’s denial of an application for the writ on the grounds that the petitioner had not exhausted certiorari to the Supreme Court. Frankfurter, joined by Black, dissented:

My view in brief is that federal courts must withhold interference with State criminal justice until every opportunity available in the State courts for the vindication of a federal right has been exhausted. Whether the State remedies have been so exhausted often involves elusive questions of local law with which district judges are more familiar than we can be without the light the lower courts afford us. Therefore, the power of the District Courts to issue a writ of habeas corpus should not be barred simply because a petition for certiorari was not first made in this Court. To hold otherwise is to disregard the settled rule that denial of certiorari has no legal significance or, in the alternative, if denial of certiorari remains without bearing on the merits in habeas corpus as in other cases, to require the State prisoner to go through the motion of securing a denial is to command a gesture which is meaningless to him and burdensome to this Court. In any event, to leave the District Courts in the dark as to what a denial of certiorari means in habeas corpus cases is not consistent with the fair administration of justice.

While continuing to affirm the exhaustion doctrine, the Court also began widening its effective reach of review, including in the designation of remedies. In 1951, the Court determined in no uncertain terms in *David v. Cook* that outright discharge was not its only available habeas remedy.

Cases in this era underscored the particular difficulties that came in applying the exhaustion principle. Even if the federal judiciary could find consensus on deference to federalism, this principle suffers some ambiguity. The circumstances of extradition especially complicate the matter. The Constitution mandates that states deliver to one another fugitives who “flee from Justice.” This would imply a natural federal jurisdiction over extradition cases, going back to the original Constitution. Yet extradition also involves state action. In the late 1940s and early 1950s, many prisoners facing extradition petitioned for habeas relief in their asylum states. In response, the Supreme Court attempted to apply the exhaustion principle. Having arisen from post–Civil War federal review of state detentions, the exhaustion rule seems a potentially inappropriate doctrine in federal extradition policy that predates such review by many years. Originally, those facing extradition were generally allowed to initiate proceedings under either federal or state courts in the asylum state, although the scope of extradition habeas corpus inquiry was limited until the early

16 U.S. Const. Art. IV, Section 2.
In two *per curiam* decisions concerning extradition, *Johnson v. Dye* in 1949 and *Sweeney v. Woodall* in 1952, the Supreme Court affirmed the exhaustion principle. The exact implications were ambiguous, although the most plausible interpretation is that exhaustion of remedies must occur in the asylum state, rather than the demanding state. In later decades, these particular requirements in all their murkiness became moot by Supreme Court decisions.

In 1953, the Supreme Court handed down *Brown v. Allen*, which clarified the modern relationship between the federal courts and state proceedings. A North Carolina court convicted Brown of rape in 1952 and sentenced him to death. He alleged a disproportionately white jury tainted by racism, the result of using tax lists to pick the jurors, and claimed he was convicted on a coerced confession. The U.S. Supreme Court denied Brown certiorari and the District Court denied him habeas corpus. The Supreme Court then granted certiorari on his appeal of that decision.

The Court ruled that if the state supreme court had already ruled against a state prisoner’s claim of federal constitutional rights violations and the Supreme Court had denied his certiorari petition, he has satisfied the state exhaustion requirement, even if he has failed to pursue a collateral remedy such as state habeas corpus on the same issues and facts. In short, the law affirming the exhaustion rule never intended to mandate “repetitious applications to state courts for collateral relief.” Furthermore, federal courts, in considering habeas relief, should not consider the Supreme Court’s denial of certiorari without giving reasons. Moreover, when the state prisoner’s complaints turn on constitutional grounds, the federal court may examine the proceedings and adjudications of both the state trial and its appellate courts. “All constitutional claims, irrespective of the adequacy of the state process or the fact that the state had fully and fairly construed them, could be relitigated on federal habeas corpus.”

Justice Reed, delivering the Court’s opinion, even admonished the lower court for denying habeas on the grounds that the Supreme Court had denied certiorari. He also argued that an avalanche of prisoner releases on habeas corpus was a distant concern, because only 67 out of 3,702 habeas petitions had been granted that year, and only a few resulted in release.

Ultimately, the decision upheld the conviction and death sentence, finding no racial discrimination in the trial process that qualified as a violation of the

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18 338 U.S. 896 (1949).

19 344 U.S. 916 (1952).


22 In *Brown*, the District Court had given consideration to the denial of certiorari, but it did not affect the outcome and so the point is moot. The District Court is also allowed not to take evidence or hear arguments, once it has the records of the earlier proceedings.

23 Duker, 258.

defendant’s Fourteenth Amendment rights, and determining that the state supreme court correctly refused review of the petitioner’s conviction because he missed the sixty-day deadline for appeal by one day. Failure to exhaust this available state remedy, without any outside interference, precludes federal habeas corpus. But despite upholding the conviction, the Court’s treatment of the exhaustion doctrine in Brown v. Allen broke new ground. Indeed, “now any federal question raised on an application for habeas corpus in the district courts of the United States could trigger ‘de novo’ review of legal and mixed legal-factual claims.”

Some scholars have even called the decision a revolution in federal habeas corpus law. According to Hertz and Liebman, however, there was no such revolution here. Aside from the view that the denial of certiorari did not count as a ruling on merits, hundreds of cases had already established these principles. Brown did reveal, however, that the compromise between federal habeas power and deference to state authority that began nearly a century ago with Ex parte Royall was now untenable:

Although Frank and especially Moore adumbrated the Court’s eventual resolution, only Brown forthrightly adopted it: All prisoners deserve one federal-court appeal as of right of their federal constitutional claim, if not on direct review in the Supreme Court, then on habeas corpus in the lower federal courts.

Justin Wert agrees that Brown v. Allen was not revolutionary and sees the real change in the defining of due process rights in which habeas had become the enforcement mechanism for a widening Fourteenth Amendment. Eric M. Freedman has also argued that Brown was simply consistent with judicial practice.

The essential principles were now in place: The federal judiciary could review questions of law de novo, but should show deference on questions of fact. Federal prisoners would get direct appeal to the U.S. Court of Appeals, but state prisoners, out of a logistical need not to clog up court dockets, would go to the lower federal courts. Broad federal habeas corpus review of state detentions was now a permanent feature of the U.S. legal system.

**THE WARREN YEARS: HABEAS AND THE FOURTEENTH AMENDMENT**

Around eight months after the Brown ruling, Earl Warren became the chief justice of the Supreme Court. The Warren Court has been described as one of the most

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26 Wert, Habeas Corpus in America, 143.
27 Hertz and Liebman, 71.
28 Wert, Habeas Corpus in America, 162.
revolutionary in American jurisprudence, typically championed by liberals and derided by conservatives. This era undoubtedly marked an expansion of habeas corpus in its scope as well as a further broadening of the concept of custody. During the Warren years the sheer number of federal habeas corpus cases ballooned, partly as a result of the precedents set in Brown. In 1953, 541 petitions reached federal courts. In 1963, there were 1,692 and by the time of the Supreme Court’s 1965 to 1966 term, the annual number was 6,356. For the individuals who received justice because of Warren’s reforms and increased habeas activity, those concerned with individual liberty surely must commend him, while keeping in mind that the man, like many other habeas protagonists, was grossly inconsistent when it came to this principle, insofar as he was an ardent supporter of Japanese Internment as attorney general of California.

In 1963, the Warren Court made it considerably easier for state prisoners to seek habeas. In Fay v. Noia, the Court considered a challenge of a state trial, where the defense had failed to challenge a coerced confession. William Brennan wrote the majority opinion summing up the Court’s new attitude: It was “manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.” Only if the state defendant waived all state remedies would he or she lose eligibility for federal review. Moreover, the petitioner’s intent to waive these remedies was subject to the Supreme Court’s fact-finding. Waiving state remedies had to be deliberate, rather than simply a result of intimidation or fear of the possibility of execution upon appeal and retrial. Such broad review “offends no legitimate state interest in the enforcement of criminal justice or procedure.” So long as all state remedies available at the time of the habeas corpus application were attempted, habeas could be granted. Moreover, constitutional issues never raised during state proceedings could still be raised in the federal habeas application.

Justices Harlan, Clark, and Stewart dissented on grounds of federalism as well as practical concerns. Such a broad review power would pose enormous costs to the bureaucracy. Clark predicted that “98% of [the claims] will be frivolous.” Harlan said the decision was a threat to “the foundations of our federal system.”

Two other cases in 1963 complemented Fay in the overall trend toward wider review. Townsend v. Sain allowed for de novo review if the state hearings had not resolved the facts, state determinations were inconsistent with the records, the state process did not amount to a full hearing, or significant new evidence became available. Justice Brennan, writing for the Court in Sanders v. United States,
conveyed a romanticized history of habeas corpus and legitimated successive applications so long as they raised different questions.

A key case in 1963 provided a new liberal interpretation of the very meaning of “custody.” In Jones v. Cunningham, Justice Hugo Black, writing for the Court, found that state parole constituted custody and that a federal district court has habeas jurisdiction over violations of the Constitution in such cases, even when the petitioner had left the jurisdiction of that court.

Meanwhile, Congress tolerated this activism. Between 1953 and 1966, Congress repeatedly refused to step in and strip away the lower federal courts’ jurisdiction over de novo review of state and federal court determinations of constitutional questions in criminal cases. But in 1966, amendments codified precedents set in modern cases, including in the 1924 case Salinger v. Loisel, which affirmed a two-hundred-year rule prescribing deference on questions of “pure fact,” demonstrating again that federal habeas corpus was a de facto alternative to federal appeal. Therefore, if the Supreme Court had determined “all issues of fact or law” in direct appeal, then habeas corpus remained unavailable. The same was true if a lower federal court had denied habeas corpus on the basis of “all issues of fact or law.”

Although the process for federal habeas corpus continued to present hoops for convicts to jump through, new legal questions became subjected to habeas review. Much of the widening of habeas protection involved the expansion of due process rights, particularly through the Fourteenth Amendment. For example, in the 1961 case Mapp v. Ohio, the Supreme Court incorporated the “exclusionary rule” – precluding convictions on evidence obtained in illegal searches and seizures – effectively barring states from such evidentiary procedures. Through the 1960s and 1970s, the federal judiciary began using federal habeas corpus to enforce the exclusionary rule. The same year as Mapp v. Ohio, the Supreme Court affirmed the right of indigent suspects to be provided counsel at trial in Gideon v. Wainwright.

The next year, the Court in Escobedo v. Illinois upheld the right of suspects to have lawyers present during police interrogations. The 1960s saw a flurry of Supreme Court cases involving the incorporation of Bill of Rights protections against state infringement. In addition to the exclusionary rule in Mapp v. Ohio, the Court incorporated what it deemed warrant requirements

Wert points out, for example, that the Chinese restriction cases cited as examples of the federal courts freeing state prisoners arose out of a statutory mandate in the Burlingame Treaty, not a simple application of the Fourteenth Amendment (Wert, Habeas Corpus in America, 155).

Hertz and Liebman, 71–2.
265 U.S. 224 (1924).
Hertz, 73.
See also Weeks v. United States, 232 U.S. 385 (1914).
Hertz, 75.
mandated by the Fourth Amendment in 1963 and 1964. The Court incorporated the Fifth Amendment privilege against self-incrimination in 1964 and its provision against double jeopardy in 1969. Along with the right to counsel affirmed in Gideon v. Wainright, the Sixth Amendment rights to confront witnesses, use subpoenas to obtain favorable testimony, and be provided a speedy trial and an impartial jury became incorporated through various decisions from 1963 through 1968. The Court applied the Eighth Amendment protection against cruel and unusual punishments against the states in 1962.

In 1966, the Court handed down one of its most radical due process decisions, Miranda v. Arizona, which held that statements made by defendants in police custody would only be admissible if the defendant was informed of the right to consult an attorney and to be protected against self-incrimination. The enforcement of Miranda through habeas soon showed how far the Court could go in overseeing state criminal justice policy, because Miranda was not even an explicit protection that came to be enforced against the states, but rather a derivative due process right, construed as implied in the Fourteenth Amendment and imposed upon the states. Whereas Gideon v. Wainwright required five states to alter their procedures, and Mapp v. Ohio forced half the states to conform, Miranda forced changes on every state.

The trend of using habeas to enforce a widening litany of due process claims and to question a broader range of convictions generally faced criticism. Two detractors in particular voiced what became very influential critiques shifting the debate and practice of federal habeas corpus. In 1963, Justice Paul Bator criticized the broadening of federal habeas corpus review, insisting that the Warren Court had misunderstood the writ and undermined the crucial principle of finality – the idea that a court determination would at some point be final and unreviewable. Bator believed that federal habeas should only apply when the state court fully loses jurisdiction, not just because it got a determination wrong.

In 1970, Judge Henry J. Friendly of the Second Circuit Court of Appeals complained of the burden on the judiciary inflicted by petitioners who lacked “a

48 Aguilar v. Texas, 378 U.S. 108 (1964)
50 Benton v. Maryland, 395 U.S. 784 (1969); the Fifth Amendment protection against takings of private property without just compensation had been incorporated in Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897).
54 Wert, Habeas Corpus in America, 150.
55 Wert, Habeas Corpus in America, 159.
colorable showing of innocence.” Presumably, guaranteeing the guilt of the convict beyond a reasonable doubt fell outside the federal courts’ responsibility. Friendly argued that the federal judiciary had no proper role, through habeas corpus, to overturn state convictions on the basis of technical violations in cases where the defendant did not appear likely to be innocent. Bator’s critique based on comity and Friendly’s based on innocence have since formed the basis of conservative intellectual ammunition against federal habeas corpus review of state convictions.

The late Warren era saw congressional attempts to curb federal review power. A 1967 amendment to the Habeas Corpus Act passed intending to limit abuses imposed by state prisoners. But the controversies persisted and the Court continued to broaden the writ’s reach. A 1968 case further expanded the meaning of custody. In Carafas v. Lavallee, the Court ruled that the petitioner, after exhausting state remedies, deserved habeas corpus relief because the evidence used against him had been seized, even though he had been released. The Court found “collateral consequences” to his conviction such as the denial of civil privileges and that habeas corpus should test his case as of the time he filed his petition.

THE BURGER COURT: SEEKING OUT A BALANCE

In 1969, Warren Burger, nominated by the new president, Richard Nixon, took over as chief justice. The Nixon administration sympathized with skepticism toward liberal due process interpretations, including Bator’s critiques of habeas enforcement. Nixon later championed the Speedy Trial Act of 1971 in the name of being tough on crime. During the Burger Court, the chief justice, along with Associate Justice William Rehnquist, who joined the Court in 1972, took up the banner of conservative habeas corpus jurisprudence, essentially giving voice to the dissenting views that had lost the day in Fay, Townsend, and Sanders in 1963.

Yet, during the Burger Court, habeas review continued to expand in some respects. In Kaufman v. United States, a man convicted in federal district court for armed robbery had pled insanity, but unlawfully seized evidence confirmed his soundness of mind. The District Court and Court of Appeals denied him relief, but the Supreme Court reversed the decision on certiorari, finding that “claim of unconstitutional search and seizure is cognizable in a proceeding under [the habeas corpus provisions in] 28 U.S.C. § 2255.” However, it also noted that state convictions were only subject

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57 Harriger, 9.
60 Duker, 295.
61 Wert, Habeas Corpus in America, 164.
to collateral attack when the constitutional claim was accompanied by a colorable claim of innocence.\textsuperscript{64}

This caveat was consistent with habeas’s current pattern of development, far from a linear trend toward more favorable circumstances for petitioners. In 1971, the Court ruled in \textit{Picard v. Connor} that federal questions raised in the federal review process have to have been raised in the exhausted state processes.\textsuperscript{65} In 1973, the Court determined in \textit{Tollett v. Henderson} that a defendant who had entered a guilty plea on the advice of counsel could not raise constitutional questions concerning the Grand Jury process that antedated the plea; only if the attorney’s advice fell “outside the range of competence” could the federal courts intervene.\textsuperscript{66}

Supreme Court justices soon echoed Friendly’s 1970s criticisms. A concurring opinion by Justice Powell in the 1973 case \textit{Schneckloth v. Bustamonte}\textsuperscript{67} complained about the exclusionary rule’s use to overturn cases through habeas corpus. He argued that the purpose of the rule was to deter violations of the Fourth Amendment, not to undermine convictions of the truly guilty.

Despite these conservative trends on questions of exhaustion, the concept of custody became broadened again in the 1973 case \textit{Hensley v. Municipal Court}. The Court ruled that being released on one’s own recognizance counts as custody. The case contributed to the practice of treating habeas corpus in terms of the broad principles of individual liberty. The Court wrote that it had “consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalism or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.”\textsuperscript{68} The same year, in the U.S. District Court Case \textit{Parker v. Thompson}, Judge Samuel P. King, a Nixon nominee, stressed the broad scope of federal habeas: “Generally, whatever affects the quantitative or qualitative aspects of an individual’s involuntary or nonconsenting confinement may be judicially reviewed in habeas corpus proceedings.”\textsuperscript{69}

In 1974, petitioners got some relief from superfluous procedures. In \textit{Francisco v. Gathright}, the Supreme Court ruled that if a high court had found a statute unconstitutional in another case, the petitioner did not need to go back to the state courts, because the constitutionality had already been addressed on direct review.\textsuperscript{70} Also in 1974, the Court found questions of federal law not purely constitutional in character cognizable in \textit{United States v. Davis}. Davis was convicted for failing to report for induction into the military. The Ninth Circuit affirmed his conviction. While the case was being brought up on certiorari, the Ninth Circuit ruled in favor of someone in nearly the same circumstances. Davis asked for an appeals hearing and initiated

\textsuperscript{64} Duker, 264.
\textsuperscript{67} 412 U.S. 218 (1973).
\textsuperscript{69} Duker, 299.
collateral proceedings. The District and Appeals Court rejected his claims, but the Supreme Court granted him certiorari, reversed the decision, and remanded the case. Judge Rehnquist dissented, insisting that 2255 made no “mention of judgments rendered in violation of the laws of the United States,” but only allowed a collateral attack where there was a lack of jurisdiction, an illegal sentence, or a violation of constitutional rights.\textsuperscript{71}

In 1976, three years after \textit{Schneckloth}, Justice Powell’s complaints became the majority opinion in \textit{Stone v. Powell},\textsuperscript{72} bringing an end to overturning state convictions through federal habeas corpus via the exclusionary rule: “where the State has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial.”\textsuperscript{73} Pointing out that the exclusionary rule grounded in \textit{Mapp v. Ohio} was a judicial remedy, rather than a personal constitutional right, the Court found that federal habeas corpus could only enforce the principles of \textit{Mapp} in the instance of “a fundamental defect which inherently results in a complete miscarriage of justice.”\textsuperscript{74}

In \textit{Wainwright v. Sykes} (1977),\textsuperscript{75} Justice Rehnquist, joined by Burger and the majority, looked at a violation of \textit{Miranda} rights that was not brought up at trial. Adhering to the standard in \textit{Fay}, the Court agreed that the defendant did not automatically waive state remedies and so could raise the complaint at a habeas hearing, but contended that the petitioner had to show cause for not having brought forward the \textit{Miranda} claim earlier, as well as evidence that it prejudiced the case.\textsuperscript{76} This decision involved a cost-benefit analysis, as well as a divergence from \textit{Fay} that amounted to a retreat from precedent. In his first draft, Rehnquist conceded that agreeing with the state in this case “would mark a significant shift away from the general principles enunciated in \textit{Fay}.” However, reasoning that what was good for the conservative goose was good for the progressive gander, he argued that the judicial history of federal habeas corpus “suggests that \textit{stare decisis} has been something less than the cardinal principle which has guided the Court in this area,” and thus the Supreme Court should feel “less constrained in deciding this case by the principle of \textit{stare decisis} than we would if we were dealing with a different statute and a less volatile course of decisional law.” Justice John Paul Stevens warned that the \textit{Wainright} decision posed the risk that the Court would come to decide many cases based on the new precedent.\textsuperscript{77}

\textsuperscript{71} Duker, 262.
\textsuperscript{74} Hertz and Liebman, 75.
\textsuperscript{76} Harriger, 10.
\textsuperscript{77} Harriger, 11.
In debates in 1977 over certiorari for state prisoners, Rehnquist complained about the problems with unlimited habeas corpus challenges. Throughout the 1970s and 1980s, state organizations similarly protested the burden imposed by federal habeas corpus law. Although the number of habeas corpus petitions continued to rise, the explosion in the number of convicts meant that the percentage of inmates who submitted such petitions shrank after the 1970s.78

The old habeas corpus issue of custody returned in Moore v. Sims, a 1979 case in which the Court decided that child custody was best left to the state government.79 The same year, in striking a most conservative tone in Rose v. Mitchell while citing a previous decision that had granted relief, Justice Blackmun declared that the innocence of the petitioner was not the central question: “[T]his Court [is not] at liberty to grant or withhold the benefits of equal protection . . . merely because we may deem the defendant innocent or guilty.”80 On the one hand, the conservatives on the Court tended to believe that habeas should apply only when there was a “colorable claim” of innocence, to use Friendly’s words. On the other hand, even a plausible claim of innocence was not sufficient in itself.

As the 1970s ended, the Court moved to modify the latitude of federal habeas review of state cases. In 1982, the Court tightened up the standards in Rose v. Lundy.81 Justice Sandra Day O’Connor, speaking for the Court, concluded that filing a habeas petition solely based on claims brought up in state processes might mean the forfeiting of the right to file another petition with new claims in an avenue that had not been exhausted. Justice Brennan believed this was unduly harsh toward the petitioners; Rehnquist thought she was too kind. This decision affirmed a principle of “total exhaustion,” as well as the retroactive effect of unacknowledged rights claims at the time of direct appeal. This further ran the risk of stripping away many legal rights that many judges would have respected.82 The Court decided the same year in Engle v. Isaac that federal habeas could not make Ohio’s new rules for jury instruction regarding burden of proof retroactive.83

In two 1986 opinions, Justice O’Connor continued to move rightward on the question of limits on federal habeas corpus for state prisoners. In Murray v. Carrier,84 she declared the need for evidence of “actual innocence” to jump over the procedural bar for relief. In Smith v. Murray,85 writing for the Court, she turned down a petitioner who had failed to pursue direct appeal. In her first draft of the case, she indicated that inadmissible evidence must be shown to have compromised the case, but, under

78 Harriger, 12–3, 16.
pressure from Justice Rehnquist, she agreed with his position that actual evidence of innocence was necessary to intervene.\footnote{86}{Harriger, 15.}

**THE REHNQUIST COURT AND CONSERVATIVE REFORM**

This trend toward a more conservative reading of federal habeas corpus, on the grounds of federalism, finality, deference to lower courts, and the bureaucratic capacity to process applications, solidified after Justice Rehnquist became chief justice of the Supreme Court in 1986. The Rehnquist Court, including Sandra Day O’Connor, Anthony Kennedy and Antonin Scalia, oversaw a shift toward a narrow standard of habeas review.

As Katy J. Harriger puts it,

> The changing decisions in federal habeas corpus cases demonstrate the evolution of argument from a focus on the principle of the primacy of individual liberty during the Warren Court, to what seems to be an unprincipled but pragmatic argument based on the need for efficiency and finality in the justice system during the Burger Court, to an argument based on the principle of federalism during the Rehnquist Court.\footnote{87}{Harriger, 4.}

The practical concern about dockets filled with arguably frivolous claims had some merit, especially considering the staggering growth of the prison population of the modern era, inaugurated by the Progressives, picking up steam in the 1960s and 1970s, and accelerated by President Reagan’s war on drugs. Yet the federal courts only received several thousand habeas petitions per year at the height of the Warren years.

The political branches’ attempts to limit federal habeas stepped up in the 1980s. In 1981 and 1982, seven different bills to curb habeas circulated in Congress. In 1983, the Republican Senate serving under President Ronald Reagan attempted to statutorily limit habeas claims in federal court, but failed in the Democrat-controlled House.\footnote{88}{Harriger, 14.}

From 1986 to 1988, the Department of Justice generated reports to Attorney General Edwin Meese outlining possible reforms, emphasizing the original role of habeas as a pre-trial remedy and suggesting limited appeals, more deference to the states, restrictions on habeas for Fifth and Sixth Amendment claims, and, ultimately, the abolition of federal habeas review of state detentions.\footnote{89}{Wert, Habeas Corpus in America, 187–9.}

Justice Lewis F. Powell, Jr., headed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, particularly taking aim at the delays before executions. In 1988, Congress sought to create a panel with retired Supreme Court Justice Lewis Powell to examine the habeas corpus appeals and formulate a reform solution. The
committee proposed that each state prisoner only enjoy one habeas appeal with a six-month limit after completion of state court appeals.\textsuperscript{95} In 1989, the Supreme Court whittled down habeas through technicalities. In \textit{Teague v. Lane}, it denied relief to a black man convicted by an all-white jury after the prosecutor used all ten of his peremptory challenges to exclude blacks. Although another Supreme Court decision\textsuperscript{91} had changed the evidentiary rules required in order to show violations of Equal Protection in the jury selection process, O’Connor, speaking for the Court, ruled that such changes were not retroactive because they did not break new ground.\textsuperscript{92} The same year in \textit{Duckworth v. Eagan},\textsuperscript{93} the Court determined that \textit{Miranda} rights did not overturn a conviction of a man who admitted stabbing a woman who refused to have sex with him. His rights were read to him but not by the book. The Court found that \textit{Miranda} was meant to be prophylactic, not “talismanic.”\textsuperscript{94} Speaking for the Court in the 1990 case \textit{Sawyer v. Smith}, Justice Anthony Kennedy cited Friendly in arguing that a new rule was not sufficiently groundbreaking to overturn a conviction where a jury had been told that another jury would determine sentencing.\textsuperscript{95}

Liberals opposed this judicial conservatism and began agitating for statutory protection of a broader habeas corpus reading. In 1990, Congressmen Robert Kastenmeier (D-WI) and William J. Hughes (D-NJ) pushed reform efforts to restrain the Supreme Court from eroding the rights of defendants. President George H. W. Bush opposed them.\textsuperscript{96}

In 1991, O’Connor, again speaking for the Court, fully embraced Rehnquist’s view on states rights and habeas corpus: “This is a case about federalism. It concerns the respect that the federal courts owe the States and the State’s procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”\textsuperscript{97} O’Connor emphasized the abstract cost concerning the respect people had in the system, rather than the material costs of procedure. Although she initially planned to maintain that the Supreme Court could still scrutinize the state legal record for errors, she deleted this point from her opinion and was then joined by Rehnquist.

The political tensions became all the more dramatic with death penalty cases. The conservative position held that such cases involved gruesome crimes that justified finality in conviction. The liberals tended to take the opposite position, arguing that “[i]f the adverse ‘custodial’ consequences of any misdemeanor or felony conviction, including the consequences accompanying parole, probation, and release on recognizance are sufficient to justify federal habeas corpus review as of right, then

\textsuperscript{90} Harriger, 15.
\textsuperscript{92} \textit{Teague v. Lane}, 489 U.S. 288 (1989).
\textsuperscript{94} Wert, \textit{Habeas Corpus in America}, 192.
\textsuperscript{95} 497 U.S. 227 (1990).
\textsuperscript{96} Harriger, 16.
such review would seem to be of infinitely greater importance when the adverse consequence is death.\textsuperscript{98}

In 1990, the Conference of Chief Justices, a convention of leaders of state supreme courts, complained about the broadness of federal habeas corpus review, especially as it concerned executions. Habeas practice “has effectively negated the law of the thirty-seven states that impose the death penalty.”\textsuperscript{99} In the 1991 case \textit{McCleskey v. Zant},\textsuperscript{100} the Court limited death row inmates to one habeas corpus writ after they exhausted their state remedies. The same year a bill passed the House that would have limited federal habeas review while requiring states with the death penalty to provide sufficient legal counsel, as well as partly reversing a 1989 Supreme Court decision limiting prisoners’ ability to retroactively benefit from Court decisions, but the bill died in the Senate.\textsuperscript{101}

Not all major cases blunted habeas review. The Court found in \textit{Withrow v. Williams}\textsuperscript{102} in 1993 that \textit{Miranda} – the right to be read your rights upon arrest – was a “subconstitutional rule” necessary for the protection of constitutional rights. With reasoning much different from the reasoning that gutted the exclusionary rule from habeas corpus proceedings, the Court unanimously held that federal habeas corpus was a proper remedy to any violation of federal statutory law that constituted “a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure.”\textsuperscript{103}

Yet, in 1993, two other cases did not favor the rights of petitioners. The Court ruled in \textit{Brecht v. Abrahamson} that the standard for determining whether a state court’s error had been “harmless” was not “beyond a reasonable doubt,” but rather whether the error had a “substantial and injurious effect.” This further weakened the tools available to convicts to question their detention.\textsuperscript{104} The same year, conservative deference to state determinations yielded what many saw as a major injustice. Guided especially by Friendly, the conservative jurists believed that in cases where state-level errors had constituted due process infringements, but the defendant did not show any likelihood of innocence, it would be inappropriate for the federal courts to overturn the conviction. However, in \textit{Herrara v. Collins}, the principle of deference had a very different result. A man convicted in 1982 of murdering a police officer and sentenced to death in Texas provided new evidence demonstrating his innocence, a deathbed confession from his brother. The Court ruled that habeas corpus was inappropriate because there was no clear constitutional violation at play. It was the

\textsuperscript{98} Hertz and Liebman, 103.
\textsuperscript{99} Harriger, 16.
\textsuperscript{101} Harriger, 18.
\textsuperscript{103} Hertz and Liebman, 77.
process – not innocence or guilt – that was most important. Leonel Herrera claimed he was innocent until the moment he was executed.105

So goes the story of how the federal judiciary, an institution often both celebrated and derided for its liberal activism, nationalized individual rights through a broadening of federal habeas corpus, only to later be subverted by practical considerations and states-rights partisans. The role of conservative Supreme Court justices is conspicuous, although the players did not always act predictably. The conservative justices accepted the unanimous decision to begin enforcing Miranda rights through federal habeas corpus, and they even went along in part with the Court in Winthrow.

This also speaks to the general problem that arose when trying to address the new, modern nationalist habeas corpus regime with an eye to the principles of federalism. Under the old, antebellum order, the states had the power to check federal detentions. Federalism signified an active writ, not a limited one. Tarble’s Case gutted this state-level power, and federal law soon empowered the federal judiciary as the main avenue for habeas corpus relief. For conservatives to appeal to the American tradition of federalism as a reason to curb federal habeas corpus is somewhat disingenuous, especially because their arguments are mired in technicalities concerning the post–Civil War exhaustion principle. Complicating matters further, conservatives in the past argued that a petition to the Supreme Court for certiorari would first have to be denied, yet certiorari hardly seems more consistent with federalism than does federal habeas.

More to the point, conservatives calling for rejuvenating state habeas corpus powers over federal detentions are not truly harkening back to America’s original judicial federalism. Few, if any, of them do so, indicating an interest more in respecting the integrity of detentions than in restoring the truly federalist nature of antebellum habeas corpus. For liberals to invoke tradition in defending federal judicial activism over state detentions is also somewhat inconsistent, for this centralizing and activist tradition, while preeminent in the English experience, does not quite define the original American practice. Many of these difficulties are intractable because of the nationalization of habeas corpus. Whereas both judicial activism and decentralist deference to local authority make sense in the context of a weak federal government with enumerated powers, today it is impossible to separate the issues and come to solid, legally sound, and non-problematic conclusions.

CLINTON’S BETRAYAL: THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

On April 19, 1995, the Oklahoma City Murrah building was destroyed in explosive violence. One hundred and sixty-eight innocents perished in the murderous act.

In response to this attack, the Republican Congress and Democratic President Bill Clinton jumped on the chance to demonize those who questioned government power, shore up the national security police state, and gut federal habeas corpus more than Rehnquist and O’Connor ever could.

Only eight days after the horrific Oklahoma City Bombing, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a bill that proposed to expand federal police powers and diminish federal habeas, hit the Senate floor. It drew much of its language from habeas reform proposals that had floated around in the 1980s, as well as those advanced in the Republicans’ 1994 Contract with America.106 It passed on the seventh of June with a vote of 91 to 8, with all but seven Democrats voting in favor. On April 18, 1996, after some deliberation and conferencing, it passed the House 293 to 133, with 46 Republicans, 86 Democrats, and one independent voting against. Six days later, President Bill Clinton signed the bill and it became law.107

The meat of the bill focused on limiting federal habeas corpus review. Although the number of petitions in federal court had ballooned to 12,000 per year by 1990,108 this number seems smaller compared to the hundreds of thousands of prisoners locked up in the justice system. Any concern that habeas before the 1996 Act resulted in the irresponsible release of an unacceptable number of inmates was belied by the 1995 Bureau of Justice Statistics, according to which federal courts overturned a tiny percentage of cases. In 1992, 63 percent of applicants were denied for procedural reasons and 35 percent on merits. Only 1 percent were granted on merits and another 1 percent remanded back to lower courts. As for the idea that even this number clogged up the federal judiciary, a National Center for State Courts study found that habeas petitions only constituted 4.7 percent of civil cases that ended in federal court in 1992. And “even though the number of state prisoners has nearly quadrupled in the past twenty-five years, the rate of habeas filings per prisoner declined steadily.” Very few applicants were turned away for abusing the writ.109 Nevertheless, the unease with the federal habeas corpus system, coupled with the fears of terrorists after April 19, 1995, allowed for this legislation to pass with very little public criticism. “AEDPA, enacted at the crest of the shock wave set off by the Oklahoma City bombing, reflected a passion-fueled, extreme, and not well thought-out form of habeas corpus bashing.”110

The AEDPA brought about major changes: The renewal and codification of the non-retroactivity doctrine of *Teague v. Lane*, the transformation of federal habeas from *de novo* review into an independent examination of the record, and the stripping

109 Harriger, 21.
110 Hertz and Liebman, vi (Foreword).
of the federal courts’ authority to grant review over a mixture of questions of both fact and law, even if they had no faith in the state court’s final determination.\footnote{111} An applicant whose attorney had failed to develop his facts in state court could now only get federal review if the claim rested on a “new” rule of “constitutional” law that the “Supreme Court” has made “retroactively applicable to cases on collateral review” or on “factual predicate” that was unable to be discovered before with “due diligence,” and if “the facts . . . would . . . establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder could have found the applicant guilty” (emphasis added).\footnote{112}

The end of full \textit{de novo} review meant that the federal courts would now look mainly at the state court’s decision. In questions of fact, there would be deference to the state court unless its finding was irrelevant, “unreasonable,” or used an improper legal standard. In the instance of an incomplete record, through no fault of the applicant, another fact-finding tribunal would be delegated. If the applicant was at fault, relief would be denied. Furthermore, successive applications – a staple of the common law tradition – would be forbidden.\footnote{113}

Under section 2254(d) of the Act, a state prisoner’s application

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Some lower courts have taken this to mean they should defer even when findings of mixed legal and factual questions were thought to be in error.\footnote{114}

Relief would be limited to

a decision [that] was contrary to, or involved in unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”\footnote{115}

This mirrored the restrictive standard used by the Supreme Court in determining certiorari.

\footnote{111}{Hertz and Liebman, 82.}
\footnote{113}{Harriger, 19, 20; Hertz and Liebman, 30, 32.}
\footnote{114}{Hertz, 81.}
\footnote{115}{Hertz, 30.}
The AEDPA featured “opt-in” Special Habeas Corpus Procedures, which streamlined deadlines and expedited filing, in exchange for states giving procedural advantages in the post-conviction process. This is hardly true federalism.\textsuperscript{116}

“Effective death penalty” appears in the title because while federal habeas during the Warren Court years served “as a general forum for supervising state court compliance with constitutional norms, it has [since] become primarily a forum for death penalty cases.” Although most federal habeas applications concerned non-capital cases, a disproportionate few at the state level resulted in federal habeas relief. Although most important reforms in AEDPA apply to non-capital cases, the shift in the debate over and emphasis of federal habeas meant that the 1996 statute appropriately looks “through the lens of the death penalty rather than the lens of federalism.”\textsuperscript{117}

This Act also made it much easier for Immigration officials to remove suspected terrorists and much harder for those accused of terrorist connections to enter the United States. Notably, these safeguards, which had no relevance to the terrorists in the Oklahoma City bombing, but perhaps had some relevance to the terrorists on 9/11, failed to do anything to prevent the latter.

Before the Act, the standard for habeas relief concerned whether a detention violated the Constitution, laws, or treaties of the United States. After the AEDPE, the federal courts focused on how the state resolved federal claims, and only if the state courts violated federal law in rejecting a habeas corpus claim would the federal courts grant relief. As Jordan Steiker put it, “The net effect of this change is to require the federal courts to leave unredressed reasonable but wrong state court legal determinations concerning the federal constitutional rights of state prisoners.” The new rules on exhaustion, procedural default, and nonretroactivity form a difficult maze of litigation that is especially onerous for state prisoners without the best of lawyers.\textsuperscript{118}

As to federalism, the situation is quite ironic: On the one hand, the law represents a gigantic expansion of federal power, approaching the establishment of a general congressional police power. On the other hand, the habeas provisions appear to honor the finality concerns of state criminal justice systems and the comity concerns of state courts. In this light, the habeas reforms of the AEDPA seem to be one of the very few examples of congressional respect for the notion of limited federal government.\textsuperscript{119}

Steiker notes the oddity of passing such a law while lashing out at partisan critics of government power. “For conservative dissenters whose rallying cries are Ruby

\textsuperscript{116} Hertz, 110.
\textsuperscript{117} Steiker, 185, 187, 189.
\textsuperscript{118} Steiker, 186, 188.
\textsuperscript{119} Steiker, 187.
Ridge and Waco, the AEDPA reinforces fears about the lurking threat of jackbooted government thugs.” At the same time, federal politicians effectively destroyed federal habeas corpus in response to the destruction of a federal courthouse.

In 1997, the Supreme Court unanimously held that the limits placed on the federal judiciary by AEDPA did not amount to an unconstitutional suspension of the writ.

A MUZZLED WRIT AND A BLOATED PRISON SYSTEM

By the end of the twentieth century, federal habeas corpus was a shell of what it promised to be in the trajectory undertaken by the Warren Court. Conservative critics of expansive habeas corpus largely won the day in the Supreme Court and then, in the aftermath of the Oklahoma City bombing, finally achieved what they agitated for in Congress throughout the 1980s and early 1990s.

This illustrated the limitations of habeas corpus in the hands of the central state; when it moves in to liberate the wrongly detained, including those in the grip of local government, those who favor justice must cheer. But this is a very rare occurrence. Moreover, when the federal courts are the primary guardians of rights against federal as well as state injustice, the problem goes even deeper. A federal judiciary that can be overtaken by liberal judicial activists can be equally vulnerable to conservative ideologues. A legal system that centers around a federal court system whose powers are defined at least as much by statute as by jurisprudential experimentation is particularly fragile, as Congress can strip away federal review of federal detentions as effectively as it can remove federal review of state detentions.

In the late twentieth century, the state and federal prison systems both expanded enormously. A brief look at California, a microcosm of the national situation, with the largest and one of the most criticized prison systems in the United States, demonstrates the recent trend. Judges used to have wide discretion in sentencing, which minimized prison overcrowding. In 1977, Democratic governor Jerry Brown stripped judges of this authority. “Over the next decade, California’s legislature, dominated by Democrats, passed more than 1,000 laws increasing mandatory prison sentences,” according to the Washington Post.

Such reforms were followed by President Reagan’s escalation of the drug war. The number of drug offenders in federal prison rose from about six thousand in 1980 to more than twenty-two thousand in 1988; the percentage of inmates in federal prison for drug offenses increased from 25 percent to 44 percent during Reagan’s two terms. At the state level, such reforms in the 1990s as California’s Three Strikes You’re Out law have led to a swelling of the prison population. In 2008, the California system was

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120 Steiker, 186.
122 http://www.washingtonpost.com/wp-dyn/content/article/2006/06/10/AR2006061000719_pf.html.
at nearly double capacity, “with almost 172,000 inmates in 33 facilities.”

Although violent crime rates nationwide fell about 20 percent between 1991 and 1998, the inmate population increased by 50 percent. In the early twenty-first century, the United States reached a record with 2 million people behind bars. Most of these prisoners – about 99 percent of them – whether state or federal, would never get a federal habeas opportunity. A disproportionate number of those who get relief are on death row.

As much as the federal government has been celebrated for its oversight of state detentions, the injustices against detainees multiplied at the federal level in modern times. The AEDPA, much like the Reconstructionists’ curbing of federal habeas for federal prisoners more than a century before, underscored the danger of leaving habeas corpus up to Congress. Having taken away the state courts’ authority to question federal detentions in 1859 and 1871, the Supreme Court now had its hands tied in terrorism and death penalty cases, and federal detainees in particular were deprived of their rightful chance at due process.

By the end of the century, habeas corpus in the United States became a centralized writ with its effectiveness in overseeing lower tribunals mired in questions of pragmatism, politics, and power – as much as it had been in England. Yet in the newest iteration of the traditional clash between executive detentions and the courts, the Supreme Court would once again serve the judiciary’s long-established role.

At the dawn of the new millennium, the classical habeas corpus struggle – between courts and arbitrary executive detentions – returned in the war on terror. After 9/11, the federal courts faced a president who revived many tricks utilized by the British crown – moving prisoners from one jurisdiction to another, labeling them as special detainees under executive prerogative. This would be the final test. The question of the ages was back: Would habeas corpus make good on its promise?

PART II

Executive Detention in Post-9/11 America
Charges of “kangaroo courts” and “shredding the Constitution” give new meaning to the term “the fog of war.” Since lives and liberties depend upon clarity, not obfuscation, and reason, not hyperbole, let me take this opportunity today to be clear: Each action taken by the Department of Justice, as well as the war crimes commissions considered by the president and the Department of Defense, is carefully drawn to target a narrow class of individuals – terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists. Our prevention strategy targets the terrorist threat.

– Attorney General John Ashcroft

In the war on terror, the traditional tension between judicial oversight and executive detention again became the predominant habeas corpus–related controversy. Upstaging the peculiarities in modern federal habeas review over state convictions, the pre-trial and extrajudicial detention policies undertaken by both the Bush and Obama administrations revived some of the oldest questions asked: whether habeas guarantees at least one chance for all detainees to question the cause of their custody; whether national emergencies allow the executive to claim greater powers than usual; which authorities have the power to issue habeas writs; what is the scope of habeas’s power as defined by statute, as opposed to common law; what constitutes a suspension of the writ. A decade of the war on terror provided ample examples of the executive’s tendency to abuse its detention powers and the limits of the judiciary to rein in such abuses.

The roundup of immigrants immediately after the September 11, 2001, terrorist attacks shows that without the classically celebrated role of habeas corpus as a pre-trial check on executive detentions, liberty will give way to expediency. The very different ways in which the government treated three American citizens detained

shortly after the attacks – John Walker Lindh, Yaser Hamdi, and Jose Padilla – reveal further limits of habeas protection.

Following the attacks on the World Trade Center and Pentagon, trust in the federal government enjoyed its largest boost since World War II. As journalist James Bovard noted, “By the end of September 2001, almost two-thirds of Americans said they ‘trust the government in Washington to do what is right’ either ‘just about always’ or ‘most of the time.’ Amazingly, the attacks even boosted Americans’ confidence that government would protect them against terrorists.” President Bush’s approval rating reached 90 percent.

The soundness of the American legal system, however, relies on a presumption of systematic and ubiquitous distrust of the government. Under ordinary circumstances, government must lawfully arrest and charge detainees with a crime. That crime must not be an arbitrary offense as determined by the executive, but rather a violation of a statutory law. That law must have gained approval from the people’s representatives and be in accordance with constitutional law. To convict someone and sentence him to prison, the government must provide the accused with a trial of his peers – twelve individuals, the supermajority of whom must find him guilty beyond a reasonable doubt. Convicts have access to an appeals process. According to popular understanding of the legal system, the most fundamental barrier to abuse is the ethical principle against arbitrary imprisonment going back eight centuries, secured by the legal process of habeas corpus. After 9/11, the idea that prisoners should have legal recourse in court to test the legality of their detention, independent of the regular criminal conviction process, became a matter of major controversy for the first time in half a century.

Despite an anti-Muslim and anti-Arab backlash right after 9/11, the United States did not conduct a mass internment of Muslim and Arab Americans along the lines of Franklin Roosevelt’s Japanese Internment. In the immediate aftermath of the terrorist attacks, the government did, however, round up more than a thousand non-citizens and deprive them of due process.

Habeas corpus had long proven an imperfect remedy for undocumented immigrants. In the 1980s, thousands of Cuban refugees, unwanted by their native country but unwelcome in the United States, languished in executive detention. Most were released in the late 1980s, but more than a thousand were stuck in prison until a 2005 Supreme Court decision.

In general, however, government in the late twentieth century treated the transgression of immigration and visa law as a civil matter. As the New York Times put it in February 2002, as a “practical matter, with eight million illegal immigrants in the population, enforcement [had] been lax. Because the immigration service lacks

3 Susan Page, “Bush’s disapproval rating worst of any president in 70 years,” USA Today, April 22, 2008.
the resources to track down violators – and, many would argue, because the United States has needed their labor – most illegal immigrants were left alone” before 9/11.5

In June 2001, the Supreme Court affirmed in Zadvydas v. Davis that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” In the next several months, this decision freed about eight hundred detainees. However, Justice Breyer’s opinion left open a loophole that swallowed this principle whole when he said the decision did not concern “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”6 Whenever the government sought to violate an alien’s rights, it would presumably only have to wave the banner of “national security” and anti-terrorism. This is exactly what happened after 9/11.

On September 17, six days after the attacks, the Immigration and Naturalization Service (INS), under the administration’s request, amended its regulations “on the period of time after an alien’s arrest within which the Service must make a determination whether the alien will be continued in custody or released on bond or recognizance and whether to issue a notice to appear and warrant of arrest.” The INS now had 48 hours to decide, except “in the event of emergency or other extraordinary circumstance,” in which case it would have “an additional reasonable period of time,”7 whatever that might mean. On September 11, all “special interest” detainee hearings were ordered closed to the public. The order shut down more than 600 such hearings.8

After 9/11, the government rounded up and detained more than 1,200 people, mostly immigrants. Of the 406 whom the Migration Policy Institute studied, 46 percent had resided in the United States for at least six years. Almost half had family in America. Fifty-two percent were detained on an “FBI hold” even after a judge ordered their release. More than 42 percent were denied bond. More than half were detained for more than five weeks, nearly nine percent for more than nine months. Only four out of these 406 ever faced charges for terrorism-related offenses. In each case these charges resulted not from immigration enforcement techniques, but from traditional investigation procedures. Only one was convicted of “supporting” terrorism.9

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6 Zadvydas v. Davis, 533 U.S. 678 (2001); King and Hoffman, 35.
This shotgun approach to arresting Arabs and Muslims relied on questionable methods. For example, the FBI ordered agents to scour phone books looking for Muslim and Arab names. Most detained without charges had no connections to terrorism. A Moroccan teenager with an expired tourist visa was detained for four months. Nacer Fathi Mustafa, an American citizen, was detained for sixty-seven days because of a supposedly fake passport, which turned out to be real. Mohammed Butt, a Pakistani, was arrested on the suspicion that he had not said hello to neighbors or mowed his lawn. Detained for overstaying his visa, he died of a heart attack in jail after days of requesting medical attention in writing. Raza Nasir Khan, a hunter, had asked to have his visa renewed but found himself arrested before renewal, then captured with a bow, arrow, and GPS in hand a few miles from a nuclear plant and jailed without bond because he had firearms — common hunting implements, but potential terrorist tools in the minds of U.S. officials. Mustaga Abujdai, a Palestinian in Texas, spent two months in jail for overstaying his visa after coming forward with helpful information about one of the 9/11 suicide pilots.

Ayazuddin Sheerazi had a valid visa but was arrested in Torrington, Connecticut, and jailed for 18 days after someone called the FBI and reported two Arabs plotting an Anthrax attack on New York. Sheerazi was Indian. Mohamed Fayed, an Egyptian dentist arrested for violating his student visa, was denied access to a phone for ten days and the Bureau of Prisons denied his detention at a New York federal prison even after his attorney knew he was there.

In Virginia, a Moroccan with an expired visa was arrested upon registering for high school and detained for four months. Ali al-Maqtari, a Yemeni citizen, was arrested on September 15 and detained for eight weeks upon taking his American wife to report for duty at the Fort Campbell Army base; authorities searched his car and found two boxcutters and postcards of New York City. According to his testimony at the Senate Judiciary Committee, interrogators accused him of abusing his wife, falsely claiming they had a statement from her to this effect; insisted their marriage was fake; insulted Islam; and threatened to “beat [him] all the way to [his] country.”

Before 9/11, the government could only detain terrorist suspects for forty-eight hours without charges. “Attorney General Ashcroft originally requested that law enforcement officials be able to detain individuals indefinitely without formal charges,” according to Mary Ellen Tsekos in Human Rights Brief. The USA PATRIOT Act, rammed through Congress without virtually any voting members reading it and signed into law on October 26, 2001, gave the government seven days

11 Bovard, Terrorism and Tyranny, 115.
12 Chishti et al., 8.
13 Lewin, “A Nation Challenged.”
14 Bovard, Terrorism and Tyranny, 117–8.
15 9 No. 1 Human Rights Brief 35 (2001).
to detain aliens without charges and, so long as the attorney general deemed the alien a “threat to national security,” the period became essentially indefinite, so long as it was processed six months at a time.\(^6\)

On November 26, Attorney General John Ashcroft responded to requests that he reveal the names of those detained by saying “the law properly prevents the department from creating a public blacklist of detainees that would violate their rights.”\(^7\) The next day he bragged that the government had charged 104 with crimes – but not a single one had anything to do with terrorism (credit card fraud, immigration violations, and sundry mundane charges characterized their alleged offenses). Ashcroft asserted that the detainees had a right to contact attorneys, but in many cases the government only provided them with incomplete and outdated lists of phone numbers, did not allow them to call until after office hours, and limited them to one phone call a week.\(^8\) On December 6, Ashcroft assured the Senate Judiciary Committee that his department took care “to target a narrow class of individuals – terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists.”\(^9\) For months, the administration resisted efforts by the federal judiciary to force them to disclose basic information on these mass secret arrests.

By October 2001, the administration had detained more than 700 people on immigration violations. It made none of these names public. By August 2002, 677 of them were released. As a result of 9/11 investigations, U.S. District Judge Gladys Kessler ordered the administration to release the names of those detained within the United States.\(^10\) Kessler made an exception for “material witnesses.”

The “material witness” process allowed the government to detain almost fifty people without charge.\(^11\) The process involved the jailing of individuals on the premise that they would eventually testify before a grand jury. In April 2002, New York U.S. District Judge Shira Scheindlin ruled that the material witness statute was being abused in the case of a Jordanian college student, calling the detention “unlawful” and intoning that “since 1789, no Congress has granted the government the authority to imprison an innocent person” in this manner. Judge Michael Mukasey came to a different conclusion in July, calling Scheindlin’s decision “flawed” and upholding the Justice Department’s detention of dozens of material witnesses.\(^12\) In October

\(^6\) USA PATRIOT Act (U.S. H.R. 3162, Public Law 107–56), Title IV, Subtitle B, Sec. 412.
\(^7\) Bovard, *Terrorism and Tyranny*, 119.
\(^8\) Those actually charged with crimes resulting from the post-9/11 roundups included such national security threats as Francois Guagani, a French citizen who had been deported previously for immigration violations. He was sentenced to 20 months in prison, having been caught with boxcutters in his luggage (he was a carpenter) (Bovard, *Terrorism and Tyranny*, 118–9).
\(^11\) Chishti et al., 13.
Mukasey had upheld the indefinite detention of Osama Awadallah, a San Diego college student, on material witness grounds, dismissing accusations that Awadallah had suffered beatings by retorting, “I will tell you that he looks fine to me.” Five years later, Awadallah graduated with honors from San Diego State and was finally acquitted on all charges that he had perjured himself in denying knowing a 9/11 hijacker. One year after that, President Bush and the Senate made Mukasey the new U.S. attorney general.

While President Bush boasted on June 12, 2002, of having “hauled in about 2,400 of these terrorists, these killers,” in fact virtually everyone so “hauled” by U.S. officials had no link to terrorism, as the Justice Department had already admitted by that time. The administration claimed success in rooting out terrorism, but as Bovard explained, “the success of the investigation after 9/11 was gauged largely by the number of people rounded up, regardless of their guilt or innocence.”

Whereas today habeas corpus primarily serves as a post-conviction remedy, the older venerated tradition touted habeas for preventing pre-conviction detention from lasting an intolerable or indefinite duration. Without access to this kind of relief, Bush’s first detainees had to wait months or years before seeing their side of the story affirmed by government officials serving as watchdogs of the executive branch. After reviewing the treatment of detainees held at Metropolitan Detention Center in Brooklyn and Passaic County jail in New Jersey, an Inspector General Report concluded in June 2003 that the government went too far: “While recognizing the difficult circumstances confronting the Department in responding to the terrorist attacks, we found significant problems in the way the September 11 detainees were treated. The INS did not serve notices of the immigration charges of these detainees within the specified timeframes.” The FBI “should have taken more care to distinguish . . . aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism.” The INS had voiced concerns about the FBI’s “blanket ‘no bond’ approach” and “about the legality of holding aliens to conduct clearance investigations after they had received final orders of removal or voluntary departure orders. . . . [The Justice] Department did not address these legal issues in a timely way.” As for detainee treatment, the inspector general found it particularly bad in one federal facility in New York: “MDC staff frequently – and mistakenly – told people who inquired about a specific September 11 detainee that the detainee was not held at the facility when, in fact, the opposite was true. In addition, the MDC’s restrictive and inconsistent policies on telephone access for detainees prevented them from obtaining legal counsel.” Furthermore, the report determined that “certain conditions of confinement [at MDC] were unduly harsh” and “the evidence indicates a

25 Bovard, Terrorism and Tyranny, 105.
Mass Roundups and Ad Hoc Secret Detentions

pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees.”

Although a scathing rebuke from within the Justice Department, the report came much too late to prevent the abuses it uncovered.

The mass roundups ended in failure. “Al Qaeda’s hijackers were carefully chosen to avoid detection,” notes a report from the Migration Policy Institute. “All but two were educated young men from middle-class families with no criminal records and no known connection to terrorism. To apprehend such individuals before they attack requires a laser-like focus on the gathering, sharing and analysis of intelligence. . . . Instead, the government conducted roundups of individuals based on their national origin and religion.” The policy created a “false sense of security” and alienated Arab- and Muslim-Americans, important potential allies against terrorism.

Based on the idealized conception of the writ’s protection of liberty, even those summarily and arbitrarily detained in the aftermath of a crisis like 9/11 would have quick access to basic due process, a lawyer, and habeas corpus. The administration in the months after the terrorist attacks sought to erode habeas corpus and related protections through statute, but also effectively circumvented its underlying civil libertarian principle by conducting virtually random roundups of people based on their perceived ethnicity and suspicions that strained credibility. The Supreme Court denied certiorari review of these cases.

As the years passed after 9/11, these detainees, mostly freed within a year of arrest, faded in the public memory. But these roundups stand as a grave reminder of the precariousness of a free society in the midst of crisis and panic, as well as a sign of what might come in the future. The overreaches in detention power immediately after September 11, although temporary, should carry great significance in a nation that fancies itself free. If the U.S. government can detain people for months free of judicial scrutiny, the original struggle to turn habeas corpus into an effective pre-trial check against arbitrary detention has already been lost.

U.S. CITIZENS AND POST-9/11 DETENTION POLICY

Even more disturbing in the long run, the government began fashioning a much more permanent detention policy to escape meaningful judicial review. Many Americans have found the treatment of U.S. citizens the most troubling aspect of post-9/11 detention policy. The nationalist tendency to look at foreigners as somewhat less deserving of procedural safeguards, or even less possessive of human rights, becomes apparent in the dismissive way Americans often view questions of immigration and even more so foreign policy. Even well-intended Americans have often spoken about


27 Chishti et al., 7.
“the rights of U.S. citizens” that, in constitutional terms, are reserved to “people” and “persons,” not just citizens. This nationalism can translate into outrage, however, when the treatment of fellow U.S. citizens appears egregious.

Most jarring in the post-9/11 detention of U.S. citizens, however, is the great variation in the treatment of these citizens. The inconsistency smacks of legal incoherence. The results of the inconsistent approaches further serve as a reminder of the limits of official due process as a means of achieving true justice.

The American Taliban

The case of John Walker Lindh did not involve a sustained deprivation of habeas corpus, but its stark contrast with other detention cases since 9/11 illustrates an important irony. On paper, in terms of procedural rights, Lindh had it better than his fellow American citizens detained on terrorism-related charges, and certainly better than aliens. In terms of what actually happened to him, he appears much less lucky.

Lindh was born in 1981 in Washington, DC, and grew up in Maryland in an upper-middle-class Catholic family, the son of a Justice Department official and lawyer. As a child, he moved with his family to California and settled in Marin, just outside San Francisco. As a teenager, he became interested in Islam through Malcolm X and converted. He traveled to Yemen in the late 1990s, returned to the United States, and in early 2000 returned to Yemen and then went to Pakistan to study in a madrassa.

During the U.S. war in Afghanistan, Lindh was captured in November 2001, by the Northern Alliance, a U.S.-allied warlord group implicated in “serious human rights abuses and violations of international humanitarian law, including killings, indiscriminate aerial bombardment and shelling, direct attacks on civilians, summary executions, rape, persecution on the basis of religion or ethnicity, the recruitment and use of children as soldiers, and the use of antipersonnel landmines.” This group later captured a majority of alleged Taliban affiliates held at U.S. prison camp Guantánamo Bay.

Lindh was held at Camp Rhino in Afghanistan and interrogated by the FBI on December 9 and 10, 2001. In fear of being left with the Northern Alliance, Lindh gave statements that the government then used against him in its indictment upon bringing him back to the United States.

28 For the landmark case adjudicating the rights of constitutional persons, not just citizens, see Yick Wo v. Hopkins, 118 U.S. 356 (1886).
31 Deborah Charles, “Lindh’s rights were violated, lawyers say,” Reuters, June 18, 2002.
Notably, a federal court of law indicted Lindh. The executive did not declare him an enemy combatant, try him by military commission, or expressly deny him habeas corpus. On the other hand, in substantive terms, he did not fare so well. On February 5, 2002, the government indicted Lindh on ten charges, including “conspiracy to murder U.S. nationals,” “conspiracy to provide material support & resources to foreign terrorist organizations,” “providing material support & resources to foreign terrorist organizations,” “conspiracy to contribute services to al Qaeda,” “conspiracy to supply services to the Taliban,” “supplying services to the Taliban,” and “using and carrying firearms and destructive devices during crimes of violence.”

The indictment mentioned the connection between al Qaeda and the Taliban and cited President Bill Clinton’s Executive Order 13129, which “prohibited, among other things, the making or receiving of any contribution of funds, goods, or services to or for the benefit of the Taliban.” Although apparently working with the Taliban was strictly illegal, one might excuse Lindh for not seeing his pilgrimage to Afghanistan as an act of war against the United States. After all, the U.S. government had actively supported the extremist elements that formed the Taliban since the late 1970s and provided considerable foreign aid to the rogue state up until 9/11. In 2001, the United States provided the Taliban more than $100 million in aid. If helping the Taliban alone was a crime, Lindh was hardly guiltier than the U.S. government.

The charges of conspiracy to commit murder against American nationals hinged on Lindh’s alleged connections to al Qaeda, not just the Taliban, which were tenuous at the very best. The U.S. government ultimately dropped all terrorism charges against him when he pled guilty in July 2002 to charges of fighting for the Taliban and carrying military weapons while doing so: “I provided services as a soldier to the Taliban last year,” he said. “I carried a rifle and two grenades.” In his statement to the court, he condemned the Taliban’s treatment of women, of which he claimed ignorance before returning to the United States, and emphasized that “Bin Laden’s terrorist attacks are completely against Islam...without any justification whatsoever. . . . I have never supported terrorism in any form and never would.”

Many have wondered why, if Lindh had merely served as cannon fodder for a wartime enemy, the government did not treat him as a prisoner of war (POW). A POW is not a criminal. The government can only detain a POW in humane conditions until the war is over. Although the Afghanistan war might persist longer

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33 Ibid.
than a criminal conviction, that would bring into question traditional POW policies, rather than indicate the government should scrap them altogether and treat POWs as criminals. This tension became increasingly relevant later for those designated as “enemy combatants.”

In exchange for pleading guilty and receiving a “mere” twenty years in federal prison, Lindh had to submit to draconian conditions. He agreed never to discuss his treatment under U.S. custody for the duration of his sentence, and he had to withdraw his allegations that he had been tortured. In support of Lindh’s motion to suppress incriminating statements he had allegedly made while in U.S. custody, his lawyers presented a well-substantiated case that Lindh had endured horrific brutality. By the time he found himself in American custody, Lindh already suffered, due to the Northern Alliance, “an irregular, unusually intense heartbeat accompanied by chest pain, severe dehydration and hunger, acute exhaustion that impaired his ability to walk without assistance, and physical and psychological shock that left him virtually mute.” He remained in a basement for seven days with shrapnel or bullet wounds in his “shoulder, back, ankle, calf and foot,” and then narrowly escaped being burned alive by the Northern Alliance. He had to drink water contaminated by blood and waste and suffered hypothermia. After sleepless nights and his rough transport to American custody in a metal shipping container, U.S. officials neglected Lindh, who had a bullet wound in the leg from the indiscriminate shooting of a Northern Alliance soldier.38

The medics did not remove the bullet from his leg so as to preserve the chain of evidence for criminal prosecution. The Special Forces interrogated him in early to mid-December 2001 without issuing him his Miranda rights (which presumably apply if they intended a criminal case). When Lindh asked for his lawyer, U.S. officials denied his right to see one and incorrectly told him no lawyer had been retained on his behalf. This withheld information became central to a scandal leading to a questionable dismissal of a Justice Department ethics expert-turned-whistleblower.39


39 The John Walker Lindh case was not without its collateral damage. In December 2001, Jesselyn Radack had been working for the Justice Department’s ethics unit for ten months after years in the department’s Honors Program. Terrorism unit attorney John De Pue asked her advice on the propriety of an FBI agent interviewing Lindh in Afghanistan without his lawyer present, after his father had retained one on his behalf. She then informed him such interrogation was “not authorized by law,” and was told it had already been done. At the time of the interrogation, the officials had “no knowledge that he did anything other than join the Taliban” – implicating the centrality of Lindh’s self-incriminating statements in discovering any alleged connection he had to terrorism (Michael Isikoff, “The Lindh Case E-Mails: The Justice Department’s Own Lawyers Have Raised Questions About the Government’s Case Against the American Taliban,” June 24, 2002).

She replied that anything coming from the interrogation could be used only for intelligence and security, not for criminal prosecution. Radak then learned that U.S. District Judge T.S. Ellis ordered all internal documents on the interrogation turned over and, according to the prosecutor, only two
Lindh’s captors transported him to Camp Rhino, insulted his faith, and ridiculed him for his unbearable physical pain. He “was stripped naked, blindfolded, bound to a stretcher with duct tape, held in a shipping container rigged with barbed wire and interrogated by the US military and the CIA.” After all this abuse an FBI interrogator confronted him. His repeated request for attorney access was denied. “[F]aced with the prospect of being returned to the same or worse conditions that had immediately preceded his FBI interrogation, Mr. Lindh signed” a waiver of his rights. For three hours, he was interrogated and not allowed to see the statement the agent was transcribing. Not until December 16 did U.S. officials remove the bullet from his leg. Not until January 6 did they allow him to receive letters from his parents and lawyers.40

Threatened with the death penalty, Lindh pled guilty for a lesser penalty.41 Despite having access to the civilian criminal justice system, Lindh found himself railroaded into pleading guilty of something not traditionally considered a criminal offense under the laws of war – simply working for the enemy military. As is demonstrated time and again, the conventional civil legal procedures of due process, including habeas corpus, are crucial to guaranteeing the rule of law, but they are not sufficient. Lindh’s lawyers continued after his guilty plea to beg for clemency, noting the great length of his sentence relative to others of similar circumstance.

Yaser Esam Hamdi

Yaser Esam Hamdi’s circumstances were not so different from John Walker Lindh’s. He was a U.S. citizen. In late 2001, U.S. forces in Afghanistan apprehended him. The U.S. government claimed he fought on behalf of the Taliban. But his legal story, in which habeas corpus played a principal role, ended much differently.

Born in Baton Rouge in 1980, Hamdi moved as a small child with his Saudi Arabian parents to their home country. His experience in the Middle East along with his Arab ethnicity might explain some of the prejudicial treatment he received.
Hamdi was eventually freed in Saudi Arabia. Although this is not a particularly free country, it would be mistaken to suppose living in a U.S. detention facility is superior to living on the outside even in a relatively repressive country. This is demonstrated by Hamdi’s preference of the latter over the former.

More on this prison camp, and the detention of enemy aliens, will follow.


*Hamdi v. Rumsfeld*, 316 F.3d 450, 463.
Jose Padilla was the second U.S. citizen whom the executive branch defined as an “enemy combatant” and detained for an extended period without traditional due process protections. His story eventually became the subject of an important, if abortive, Supreme Court decision concerning habeas rights and jurisdiction.

On May 8, 2002, Padilla was arrested at O’Hare International Airport in Chicago, after having traveled to Egypt, Saudi Arabia, Afghanistan, Pakistan, and Iraq. The government held him as a material witness. He petitioned to have his material witness warrant vacated. On June 9, right before District Court Judge Michael Mukasey ruled on whether Padilla could be detained under the material witness warrant, Bush designated Padilla an “enemy combatant” and ordered Defense Secretary Donald Rumsfeld to transfer him to a military brig in South Carolina. Neither his family nor his attorney was notified at first.

Padilla’s attorney then filed a habeas corpus petition in New York’s Southern District Court, alleging that the military detention was unconstitutional. She named as respondents – the parties who would have to respond to the claim – President Bush, Defense Secretary Rumsfeld, and Melanie Marr, the commander of the military brig. Unlike in the case of Hamdi, whose indefinite detention the Fourth Circuit Appeals Court upheld in January 2003 on the grounds that he had been “capture[d] in a zone of active combat operations,” Padilla was arrested by domestic law enforcement within the United States. This distinction made the difference.

The government moved to dismiss the habeas petition on the grounds that Marr was the only proper respondent, but the New York District Court had no jurisdiction over her because the brig was in South Carolina. The court determined that the defense secretary’s involvement in the detention made him a proper respondent, and that the District Court had personal jurisdiction over him because of the state’s long-arm statute. The District Court agreed that the president had the authority to militarily detain enemy combatants, but held that “some evidence to support the President’s decision to designate him an enemy combatant” was necessary, and that the courts could review such evidence.

On December 18, 2003, the Second Circuit Appeals Court upheld the District Court’s decision that Rumsfeld was a proper respondent. It found that “the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent” in cases “other than federal criminal violations.” The Appeals Court further held that the president had no authority to detain Padilla militarily. It ordered that Padilla be released within 30 days, or charged with a crime.

49 316 F.3d 450 (4th Cir. 2003).
50 542 U.S. 426 (syllabus); http://www.nysd.uscourts.gov/rulings/02CV04445.pdf.
The Bush administration appealed this decision, and the Second Circuit Court suspended its ruling in January 2004. In March 2004, Padilla’s lawyers met with him for the first time in almost two years. His case went to the Supreme Court in June 2004 but his story hardly ended there. Chapter 13 and Appendix D discuss Padilla’s case in detail.

A WARTIME PRESIDENCY AND THE RIGHTS OF THE CUSTODIAN

The hundreds of immigrants rounded up and denied due process shortly after 9/11 demonstrated the limits of federal habeas corpus. It was totally incapable of ending such capricious executive detentions. Compared to longer-term detentions, the custody of aliens lasted “only” a few months. Yet this means one of the originally celebrated purposes of the writ – to prevent the executive from jailing detainees for longer than a few days without cause – must have become a dead letter long ago.

The treatment of American citizens captured on the battlefield for the supposed crime of fighting for the enemy shortly after 9/11 reveals habeas’s limits in another way: John Walker Lindh had his day in court, was railroaded into a confession, and was sentenced to a twenty-year prison term. Civil procedure served him no better than military justice. Yaser Hamdi underwent military detention but eventually saw relief thanks to habeas, yet it took far longer than it would have had the writ carried the power that advocates claimed it had for centuries. Jose Padilla, a U.S. citizen captured on U.S. soil, was also denied justice in a palpable sense, even as the legal system was “working” as it was supposed to.

Even more severe has been the treatment of “enemy aliens” in the war on terror. In this regard, the executive branch proved itself to resemble the despotic executives custodians of English history, plotting to create a military legal system independent of the civilian judiciary and international law.
Enemy Aliens and Bush’s Prerogative

Technically, unlawful combatants do not have any rights under the Geneva Convention.

– Defense Secretary Donald Rumsfeld

The Bush administration in its first term unleashed a whirlwind of far-reaching policies on enemy aliens, comprising a legal theory to deprive detainees of both POW status and criminal justice protections and the creation of a prison camp at Guantánamo Bay. These policies brought light to the problem of unchecked executive detention power in the context of torture and enhanced interrogation techniques.

Although many have viewed U.S. detentions of U.S. citizens without due process protections as a much greater concern than such treatment of foreigners, the precedents set in dispensing with the rights of aliens have implications for the long-term liberty of citizens as well. As David Cole put it,

Virtually every significant government security initiative implicating civil liberties – including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention – has originated in a measure targeted at noncitizens.


MILITARY TRIBUNALS

On September 18, 2001, Congress passed a joint resolution authorizing the president to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons.4

President Bush claimed authority from this Authorization for Use of Military Force, as well as from his Article II powers, to order the creation of tribunals to try non-citizen terrorist accomplices.5 The president’s lone determination that he had “reason to believe” that an individual committed, aided, or abetted “international terrorism” would suffice in convening a trial. The order designated military officials, not Article III judges, to preside over the trials, which could operate in secret. Bush singled out district courts to strip them of jurisdiction: “Given the danger to the safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” The order deprived detainees of habeas recourse in language that affirmed “individual[s] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or have any such remedy or proceeding sought on the individual’s behalf in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.” Bush gave the order on November 13, 2001, although no military commissions began in Guantánamo until August 2004.

The order shared resemblances with President Franklin Roosevelt’s military commission order in 1942,6 and the parallels and differences became important in legal arguments over the following years. Only two-thirds of the tribunal had to vote in favor of conviction and sentencing. As with Roosevelt’s order, defendants would “not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf in” any U.S. court, foreign court or international tribunal. The two orders also evinced differences concerning the role of the attorney general, and Bush’s order did not apply to U.S. citizens, consistent with the finding in the landmark 1866 habeas corpus case Ex parte Milligan’s7 protection of citizens in civilian courts so long as they were operating.

6 Louis Fisher, Military Tribunals, 168.
7 71 U.S. 2 (1866).
Most important, unlike in Roosevelt’s case, where the Nazi saboteurs confessed, Bush’s order applied much more broadly to anyone the president had “reason to believe” “is or was a member of the organization known as al Qaeda,” “has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy,” or has “knowingly harbored one or more individuals described” by the order. According to Louis Fisher, expert on constitutional law and presidential war powers, this broad brush potentially applied to an estimated 18 million people. As Neal K. Katyal and Laurence H. Tribe pointed out, the order widened the anti-terror net cast by the Authorization for the Use of Military Force so it could ensnare people who never intended to cause harm or break any laws. The administration claimed the military commissions only applied to “unlawful enemy combatants,” yet the traditional definition of this term would have probably excluded Taliban fighters, whom Bush no doubt intended to include.

Traditionally, the executive created military commissions when there existed a pretense of military necessity – either along with martial law or on the battlefield where normal courts did not function. When the executive had ample time to deliberate, as Bush appeared to have in the months before ordering military commissions, Congress had an appropriate role. In this case, President Bush acted unilaterally to create executive branch courts outside the control of the federal judiciary and without express congressional approval. This action thus sparked controversy concerning the key constitutional principle of the separation of powers.

8 Fisher, Military Tribunals, 169.
9 Katyal and Tribe write: “the Order expressly covers all those who have ever ‘aid[ed] or abet[ted]’ terrorists ‘or act[ed] in preparation for’ terrorism. In contradistinction to its harboring provision, which covers only those who ‘knowingly harbored’ terrorists or members of al Qaeda, this provision conspicuously contains no mens rea requirement at all” – in other words, the subject would not have to have intended harm, to have maliciously and purposefully done anything wrong. “[H]iring a car for a friend when the friend turns out to be a terrorist, or donating money to a charity when that charity turns out to be a front for terrorism” could suffice (Neal K. Katyal and Laurence H. Tribe, “Waging War, Deciding Guilt: Trying the Military Tribunals,” The Yale Law Journal, Vol. 111, April 2002, 1263).
10 Katyal and Tribe, 1264.
11 The executive branch established its military commissions system all on its own. Especially given the seriousness of the power – the power to detain, to strip individuals of their liberty indefinitely – the administration was thus attacking a core American constitutional value: “that great power must be held in check and that the body that defines what conduct to outlaw, the body that prosecutes violates, and the body that adjudicates guilt and dispenses punishment should be three different entities” (Katyal and Tribe, 1259).

Unless Congress simply cannot be involved due to emergency, Congress traditionally should have a role, under the principles of American constitutionalism. When the president issued his order in November 2001, he effectively claimed the power to detain, try, convict, and punish anyone from a wide class of individuals – “potentially jeopardizing the rights and liberties of the approximately 20 million aliens in the United States, as well as any non-United States citizen anywhere in the world” (Katyal and Tribe, 1261).
Invoking a broad reading of the AUMF, some argued that Congress indeed authorized such commissions. If the resolution carried such broad implications, however, then the resolution posed questions of constitutionality. Another argument appealed to the necessity of the president to respond to national security faster than Congress could. But there is a difference between responding to imminent dangers and implementing a detention policy over months or years, a policy the Constitution specifically entrusts to Congress. Yet another pro-executive argument held that the president, as commander in chief of the military, has the power to create and control such commissions. Bush Justice Department official John Yoo consistently maintained that constitutional presidential war powers include a very wide detention power. However, this interpretation relies on a very broad understanding of the commander in chief’s role as actually designated by the Constitution.

If the war on terror qualifies as a war, one might suggest prisoner of war status for enemy prisoners. Vice President Dick Cheney said the detainees “don’t deserve to be

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12 If read very broadly, this would mean the president could try and sentence anyone on earth, if we are very charitable and believe that military courts count as “military force” and that he indeed “determined” all detained persons aided or abetted the attacks. But what if his determination turned out to be wrong, as it did in many cases of people detained at Guantánamo Bay?

Furthermore, if indeed this resolution authorized the president with such broad powers, the resolution itself would be unconstitutional. As it is, Congress cannot delegate to the president the power to declare war (Katyal and Tribe, 1290), much less the power to target individuals for punishment without due process and statutory authority. Insofar as the AUMF resolution did what defenders of Bush’s detainee policy claim, it is an illegal resolution.

13 While Katyal and Tribe, like many early critics of the president’s military commissions, believe that in times of imminent emergency, the president can act – repelling invading forces even before an official declaration of war from Congress, setting up military commissions when the courts are not functioning – “in the absence of an emergency that threatens truly irreparable damage the nation or its Constitution, that Constitution’s text, structure, and logic demand approval by Congress if life, liberty, or property are to be significantly curtailed or abridged. . . . Congress at a minimum must clearly provide by law for the trial of such combatants by military commissions; it can do so either through a formal declaration of war or by specific authorizing legislation” (Katyal and Tribe, 1266). In particular, Congress is vested with the power to create “tribunals inferior to the Supreme Court” (U.S. Const. art. I, §8, cl. 9). The system of checks and balances in the Constitution produces a “‘rights-protecting asymmetry’ whereby the concurrence of all three branches is necessary before the government may decisively alter anyone’s legal rights” (Katyal and Tribe, 1268).

14 While the president is “Commander in Chief” of the armed forces, once a war has been declared, he may legally decide the manner by which he takes custody of foreign nationals, but “[t]he moment the President moves beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment . . . he has moved outside the perimeter of his role as Commander in Chief of our armed forces . . . [A] president who sets out to put on trial and then to punish offenders against the laws of war in the course of a constitutionally directed military campaign must generally be regarded as no different from a president who sets out to try and punish those whom he regards as offenders against any other body of law.” Although war is within the presidential purview, those detained in the process of the president carrying out his war power are no constitutionally different from “a gang of thugs attempt[ing] to obstruct” the president as he carries out other constitutional powers, such as if he is “engaged in an exercise of his power to veto, pardon, make recess appointments, receive ambassadors, call out the militia to protect the state from invasion, or negotiate treaties” (Katyal and Tribe, 1268–70; also see Ball, 48–9; Fisher, Military Tribunals, 195–6; Worthington, The Guantánamo Files, 128).
treated as a” POW because they were unlawful enemy combatants. Attorney General John Ashcroft argued that “Foreign terrorists who commit war crimes against the United States . . . are not entitled to and do not deserve the protection of the American Constitution.” Stewart A. Baker, Washington attorney and former general counsel of the National Security Agency, put the question in simple terms: “I don’t think anyone wants to see Osama bin Laden brought before a court here to be defended by Johnnie Cochran.”

The irony is that if a civil court actually tried Osama, regardless of his defense attorneys, he would have almost surely been convicted. Moreover, the war on terror policy pursued since 9/11, including the controversial detentions that supposedly produced indispensable intelligence, took almost ten years to apprehend bin Laden.

The United States has relied on civilian courts to try terrorist suspects in many cases. Civil courts indicted and tried Oklahoma City bomber Timothy McVeigh. Such a process most likely produced convictions in post-9/11 terrorist cases hundreds of times. Around the time the Bush administration formed its extralegal detention policy, it convicted at least one alleged terrorist in civil court – British citizen Richard Reid, the “shoe bomber” who, in December 2001, attempted to destroy a passenger plane with a bomb in his footwear. He enjoyed civil proceedings, despite not being a U.S. citizen and despite the fact that what he had attempted was clearly a crime of terrorism, rather than an act of fighting on the side of a foreign government in a foreign country during wartime (as was the case with Lindh). Reid was by any reasonable definition a criminal and would-be terrorist, and was tried under the color of civilian law. Ironically – and understandably – the government showed a propensity after 9/11 to allow the most due process rights for those suspects against whom it had the strongest evidence. Many, if not most, detainees touched by the war on terror, on the other hand, never committed or planned terrorism and yet never enjoyed the procedural niceties provided to Reid.

GENEVA CONVENTIONS AND OTHER QUAIN'T HUMAN RIGHTS CONCERNS

In early 2002, the administration struggled within itself over the Geneva Conventions and alien detainees. The State Department favored adhering to the treaty, whereas the Defense Department and, most likely, the CIA argued against this approach. On January 9, 2002, the Defense Department general counsel, William J. Haynes II, received a memo from Deputy Assistant Attorney General John Yoo and Justice Department special counsel Robert J. Delahunty, which read that “It is clear . . . that members of the al Qaeda terrorist organization do not receive the protections of the laws of war . . . . Taliban militia detainees also do not receive the protections of the laws of war . . . .

16 The precise number is difficult to determine. See Ari Shapiro, “Just How Many Terrorists Has the U.S. Convicted?” NPR.com, February 11, 2010.
laws of war because the Taliban was not the *de facto* government of Afghanistan.” Although Afghanistan was a signatory since 1946, the Conventions did not apply to the Taliban, a “failed state.” White House Counsel Alberto Gonzales soon echoed this line. A White House memo in February 2002, kept secret until June 2004, insisted that the president could suspend the Geneva Conventions and that Taliban detainees were “unlawful combatants.” In January 2002, Gonzales provided a memo to President Bush reassuring him that the Third Geneva Convention did not apply to war with al Qaeda. Gonzales found arguments for adhering to Geneva “unpersuasive” in this “new kind of warfare.” On the day Guantánamo opened, Rumsfeld said publicly, “Technically, unlawful combatants do not have any rights under the Geneva Convention.” He did offer some weak assurances that on its own good graces the administration would practice restraint: “We have indicated that we plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.”

Throughout 2002, the administration’s lawyers and advisers exchanged memos that went even further in upholding nearly unlimited presidential authority, including the power to override all laws and treaties, the effective exemption of all CIA interrogators from any anti-torture laws, and the notion that during the “asymmetrical” war on terror, other branches must defer to the executive.

Some dissented from these policies, detecting an irony in the United States adopting secret military trials not so different from the ones the U.S. State Department criticized in countries like Burma, China, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Peru, Russia, Sudan, and Turkey. Conservative pundit William Safire characterized Bush’s newly declared authority as “what amounts to dictatorial power to jail or execute aliens.” Senator Arlen Specter, at the time a Republican, voiced concern that Bush was usurping Congress’s role to set up tribunals. Hundreds of legal professionals signed a letter to Senator Patrick Leahy saying the order “undermines the tradition of the Separation of powers.” The order faced international resistance, too, such as from Spain, which declared it would not extradite terror suspects without a guarantee of a full trial.

The administration struck back to criticisms with appeals to fear. In early December, Ashcroft spoke at the Senate Judiciary Committee, giving this now infamous statement:

> To those who pit Americans against immigrants, citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to

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18. Ball, 89.
America’s friends. They encourage people of good will to remain silent in the face of evil.\textsuperscript{21}

A few days later, a bill to preserve habeas corpus, HR 3468, never even got to the point of a vote.\textsuperscript{22}

On January 4, 2002, the American Bar Association’s Task Force on Terrorism and the Law concluded that non-citizens have due process rights, at least within the United States, and that the president’s order had not and probably could not have expressly suspended the writ of habeas corpus. The detainees caught under Bush’s order “should be permitted to seek habeas corpus relief in United States courts.”\textsuperscript{23}

In fact, the administration fully understood the tension between traditional due process and its detention policy. One reason it adopted military commissions was to allow hearsay evidence. Bush’s order specifically ruled out judicial review. The desire to avoid procedural safeguards underlay the entire motivation behind the executive order.

The detention policy’s underlying principle was that the detainees were neither proper soldiers deserving of Geneva Convention protections and POW status, nor criminal suspects entitled to due process protections. In a speech to the American Bar Association in February 2004, then–White House Counsel Alberto Gonzales summarized the Bush detention doctrine:

Under these rules, captured enemy combatants, whether soldiers or saboteurs, may be detained for the duration of hostilities. They need not be “guilty” of anything; they are detained simply by virtue of their status as enemy combatants in war. This detention is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing enemy combatants from continuing their attacks. Thus, the terminology that many in the press use to describe the situation of these combatants is routinely filled with misplaced concepts. To state repeatedly that detainees are being “held without charge” mistakenly assumes that charges are somehow necessary or appropriate. But nothing in the law of war has ever required a country to charge enemy combatants with crimes, provide them access to counsel, or allow them to challenge their detention in court – and states in prior wars have generally not done so.\textsuperscript{24}

Under the Third Geneva Convention, soldiers are either lawful combatants, worthy of all POW protections, or are illegal combatants – spies or saboteurs – in violation of the criminal law and thus subject to criminal prosecution but also such due process protections as habeas corpus. They can only face military commissions that have been properly constituted. As a final safeguard, Article 5 of the Convention


\textsuperscript{22} Fisher, Military Tribunals, 176.

\textsuperscript{23} Fisher, Military Tribunals, 179.

guarantees minimum POW privileges to those with an unknown status “until such time as their status has been determined by a competent tribunal.” U.S. Army Regulation echoes this protection. In the Korean and Vietnam Wars, tribunals reviewed prisons with an unknown status, transferring many of those it deemed illegal combatants to civilian courts. In the first Gulf War, hearings determined that hundreds of captives were innocent civilians and released them or else soldiers it then granted POW status. Altogether, more than 69,000 Iraqi detainees were processed in that short war.

To circumvent the Constitution, Geneva Conventions, and habeas corpus, the administration created a prison camp presumably outside U.S. jurisdiction at Guantánamo Bay. This was one of the oldest tricks in the book, hearkening back to the English king’s creation of tribunals outside the royal courts’ jurisdiction.

GUANTÁNAMO BAY: THE WORST OF THE WORST

In 1901, the United States government began negotiating the end of its occupation of Cuba, which it had “liberated” from Spanish rule starting in 1898. The terms of withdrawal, as set forth in the Platt Amendment, included a concession from Cuba to sell or lease territory to the United States to use as fueling and naval stations. In 1903, the two nations signed a treaty proclaiming that Cuba retained “sovereignty,” but “the United States shall exercise complete jurisdiction and control” over territories like the Guantánamo Bay naval base. The agreement was revised in 1934. The U.S. government found its permanent U.S. lease of Guantánamo Bay convenient in the aftermath of 9/11.

On December 28, 2001, two Justice Department chief attorneys wrote a memo to William J. Haynes II, General Counsel for Defense, arguing that the “great weight” of legal authority indicated that the federal courts “could not probably exercise habeas jurisdiction” over Guantánamo. Their reasoning persisted throughout the Bush years: Guantánamo Bay is not part of the jurisdiction of the United States, despite the fact that from the time of the original treaty, the United States has exercised “complete jurisdiction” over it. The administration figured it could have, from its perspective, the best of all worlds: complete control without any oversight from the judiciary. In attempting to escape both the confines of international military law and domestic constitutional law, the administration created what many have since called a “legal black hole.”

On January 11, 2002, the first detainees arrived at Guantánamo Bay. Defense Secretary Rumsfeld labeled them “unlawful enemy combatants,” depriving them

25 Howard Ball, 44–5.
26 Hafetz, Habeas Corpus After 9/11, 36.
27 Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903; available at http://avalon.law.yale.edu/20th_century/dip_cubaco2.asp.
28 Fisher, Military Tribunals, 196.
of both POW status and the chance to show they were innocent bystanders. The government did not reveal their identities for the next four years. Eventually, 774 prisoners were detained there, most of whom had absolutely nothing to do with Al Qaeda or anti-American terrorism – “the vast majority were either Taliban foot soldiers, recruited to fight an inter-Muslim civil war in Afghanistan that began long before 9/11, or humanitarian aid workers, religious teachers and economic migrants, who were, for the most part, sold to the Americans by their allies in Afghanistan and Pakistan.”

As soon as Guantánamo entered the public eye, top administration officials began characterizing them as some of the greatest villains the world had ever known. “These represent the worst elements of al-Qaeda and the Taliban,” said Brigadier-General Mike Lehnert, the Marine in command of the prison camp. Donald Rumsfeld in January 2002 called them “committed terrorists” and, in another instance, “among the most dangerous, best trained, vicious killers on the face of the earth.” (This hard-line approach to the detainees stood in stark contrast with the administration’s attitude toward Osama bin Laden himself, whose capture the administration declared was not a high priority.)

The Los Angeles Times quoted a U.S. intelligence official in August 2002 as saying that, in fact, the prisoners were “low- and middle-level” associates with the Taliban, not “the big-time guys.” Lehnert soon backed off his own rhetoric: “A large number claim to be Taliban, a smaller number we have been able to confirm as al-Qaeda, and a rather large number in the middle we have not been able to determine their status.”

Many of the first prisoners were captured along with John Walker Lindh and Yaser Hamdi or at other times by the U.S.-friendly Northern Alliance, a radical

29 Ball, 45.
30 Worthington, The Guantánamo Files, xii–xiii.
32 In March 2002, President Bush said at a press conference he was “deeply concerned about Iraq” but as for Osama, he said, “I truly am not that concerned about him. I know he is on the run. I was concerned about him when he had taken over a country. I was concerned about the fact that he was basically running Afghanistan and calling the shots for the Taliban” (“Transcript of Bush Press Conference,” CNN.com, March 13, 2002). Two years later, Secretary of Defense Donald Rumsfeld said that “capturing or killing al-Qa’ida leader Osama bin Laden would not ‘change the problem’ of international terrorism” (Robert Burns, “Rumsfeld: bin Laden isn’t only problem,” Associated Press, March 16, 2004). Yet throughout those years, any reluctance to treat the Guantánamo prisoners as though Western civilization depended upon their continued detention without judicial oversight was regarded to be appeasement to terrorism. But many of those captured were aid workers coming into the country to help in the midst of the devastating war, or people trying to flee to safety.
34 The first large group of prisoners was apprehended in Kunduz, the last northern city to fall during the war, where many surrendered to General Dostum not knowing what was in store for them. Upon surrender they were disarmed and loaded onto trucks and taken to Mazar-e-Sharif. Some killed themselves with hidden grenades. CIA agents interrogated them, and this is when they discovered John Walker Lindh. An uprising was temporarily successful, killing a CIA agent and letting many prisoners go free, until U.S. air strikes fired back and Special Forces poured oil onto and burned the
coalition of Tajiks, Uzbeks, and Hazaras at civil war with the ethnic majority Pashtuns running the Taliban. U.S. officials relied on the Alliance as proxies in Operation Enduring Freedom, America’s first post-9/11 military operation in the war on terror in Afghanistan. The Alliance failed to capture Osama bin Laden, but it managed to round up hundreds of people who had no quarrel with the United States, people it then turned over to the United States in exchange for handsome cash rewards. U.S. PsyOps dropped tens of millions of leaflets during the first year of the Afghanistan war, many of which featured the image of an Afghan Elder with a message reading, “Get wealth and power beyond your dreams – help the anti-Taliban force to rid Afghanistan of murderers and terrorists.” On the back of the leaflet it said,

You can receive millions of dollars for helping the anti-Taliban force catch al Qaeda and the Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life – pay for livestock and doctors and school books and housing for all your people.

Pakistani officials turned over many detainees in exchange for money. President Musharraf boasted in his autobiography that by handing over 369 suspects to the United States, Pakistan had “earned bounties totaling millions of dollars.” As late as October 2007, 370 detainees at Guantánamo had been turned over to U.S. forces for rewards – $5,000 each for alleged Taliban and $25,000 each for alleged al Qaeda.

Many of these captives were merely conscripted Taliban soldiers. Many soldiers never intended to fight Americans, but rather Russians. Other captives were not even Taliban soldiers, such as the Uyghurs simply living in Afghanistan to escape house where they had taken refuge. Soon, 175 corpses were found. U.S. forces then proceeded to flood out the basement where the captives were holed up. Yaser Hamdi was soon discovered among them. Out of 86 survivors of this chaotic uprising, “at least 50 – including 21 Saudis, nine Yemenis, several prisoners form other Gulf countries and North Africa, and a dozen men from the countries bordering Afghanistan to the north – were subsequently transferred to Guantánamo, where their alleged participation in the ‘uprising’ was used against them in their tribunals. It’s far from clear, however, that the majority of them were anything more than Taliban foot soldiers, prepared to help the Taliban but unprepared for 9/11, the U.S.-led invasion, and a “Global War on Terror” in which they would come to be regarded as terrorists” (Worthington, The Guantánamo Files, 7–12).


Of course, when these forces were resisting the Russians, the United States had been on their side. (See “The CIA’s Intervention in Afghanistan,” Interview with Zbigniew Brzezinski, President Jimmy Carter’s National Security Adviser, posted at globalresearch.ca, October 15, 2001. http://www.globalresearch.ca/articles/BRZ110A.html.) The evidence against these prisoners generally involved their having been in the wrong place at the wrong time, serving with the Taliban, knowing the wrong people, and participating in the “uprising.” Few probably were involved in this short-lived resistance, and many were hurt in the process. “They handcuffed us and put us in a court, a big open space, and there were explosions behind us. Shrapnel from that explosion hit me,” one of the detainees said. “We were handcuffed when the shooting started. The only people who had weapons were the Northern Alliance, and they were shooting at the detainees. . . . I got shot and lost consciousness, and my brother was killed. He was handcuffed when he was killed,” said another.
poverty and oppression under the Chinese government in East Turkistan. The second large group of captives came from the thousands who surrendered to General Dostum at Yerghanek. Those surrendering included hundreds of civilians who found themselves in the mayhem or fleeing the Taliban and al Qaeda. Captives often had to endure transport in metal shipping containers, where many suffocated and many others feared certain death (in 1997, 1,250 Taliban soldiers had been murdered this way). Some remained in containers for days without water, resorting to drinking the blood of their fellow prisoners.

Others had been taken prisoner at Tora Bora upon U.S. victory there in mid-December. This group mostly included “new recruits and religious students who were passing through a valley on their way to Pakistan when they were targeted in a US bombing raid.” None captured there probably knew anything more about Osama’s whereabouts than the mainstream media – that he had been somewhere in the Tora Bora mountains and likely escaped by the time the Americans claimed victory.

On December 15 and 16, Pakistani forces arrested thirty-nine “suspected al Qaeda” members. Only a few had any connection to al Qaeda and most of them were only “proven” guilty through tortured confessions. The rest were soldiers, civilians, and humanitarian workers. American interrogators soon found it difficult understanding why, under Islam, a catastrophe like the U.S. invasion of Afghanistan would compel so many to come and offer aid. Teachers who wished to work in Afghanistan had to stop at Taliban-controlled houses simply to enter the country, the only connection some detainees had to the Taliban. The only evidence the United States had for the Taliban membership of some prisoners was they had no passports. Those who trained with the Taliban had to hand them over. Stories of how passports were simply lost or stolen did not easily sway U.S. interrogators.

The next large group of captives comprised refugees who had successfully escaped into Pakistan, only to be rounded up and handed over. They came from Algeria, Bahrain, Belgium, China, Denmark, Egypt, France, Jordan, Kuwait, Libya, Morocco, Saudi Arabia, Spain, Sweden, Syria, Tunisia, Turkey, and Yemen. They included some jihadists, but also Taliban infantry from Saudi Arabia and Yemen, humanitarian aid workers, religious students, and refugees of China, Europe, and North Africa. At least one prisoner, Abdullah al-Rushaydan, never went to Pakistan, but was detained for nearly five years because of his affiliation with the International Islamic Relief Organization, an international charity accused of channeling funds to Osama bin Laden, and because he took time off with the intention to assist with an Afghan refugee camp in Pakistan. Although the administration appeared less concerned about bin Laden himself, anyone associated with a large global charity

Estimates of how many prisoners were executed outright while tied up by the Northern Alliance range from eight to 250 (Worthington, The Guantánamo Files, 13–14).

that had a slight affiliation with him could suffer years of detention, so long as he was in the wrong place at the wrong time and the beginning of Operation Enduring Freedom.

The profiles of some Guantánamo detainees illustrate the injustice of detaining these people and characterizing them all as the worst of the worst. One humanitarian worker, Omar Rajab Amin, entered Afghanistan and then decided to leave as he learned of cities falling to the Northern Alliance. At the border he was swept up, then sold to the United States. He was eventually freed from Guantánamo in September 2006, almost five years after being detained. He says he would have never gone to help had he known the United States would not “apply the Geneva Convention, especially to people who worked in [a] charity organization.”

Mohammed al-Adahi was a thirty-nine-year-old, married with kids, who lived in Yemen his entire life. He traveled in August 2001 with his sister to meet her husband, who was working in Afghanistan for a charity organization. Al-Adahi was apprehended on a bus going back through Pakistan and, because he was Arab and had a passport, was sent to Guantánamo. Murat Kurnaz, a nineteen-year-old apprentice and shipbuilder, the son of Turkish immigrants, born and raised in Germany, went to Pakistan to study religion and was captured in November 2001.

Abudullah al-Ajmi, a Kuwaiti businessman with businesses in Saudi Arabia who traveled to Pakistan to provide charity to refugees fleeing Afghanistan, was detained even though he claimed he never set foot in Afghanistan. Amran Hawwasi and Khalid Mohammed were Saudi charity workers, and Adel Farough El-Gazzar was an Egyptian charity worker. The three were working at refugee camps where they were injured by bombings. From Saudi Red Crescent Hospital, they were seized and taken to Guantánamo.

Mohammed El-Gharani, born in Saudi Arabia, was fifteen years old when he was captured in Pakistan, where he had gone to learn English and computer skills. While under Pakistani custody, he was hung by the wrists, mostly naked, for sixteen hours a day for three weeks. He was forced to drink water and had his penis tied tight so he could not urinate, and was threatened with having it cut off. He was sold to the Americans and detained for seven years. In January 2009, a federal judge ordered his release. In June, he was repatriated to Chad and held for some time in custody.40

Sami al-Hajj, a Sudanese cameraman covering the war for al-Jazeera, married with a baby child, was falsely thought to have filmed the interviews with Osama bin Laden. He was mistreated, taken to Guantánamo, and interrogated more than a hundred times. Pakistani Intel Services Intelligence Directorate singled out Abdul Rahim Muslim Dost and Bader Zaman Bader, two Afghan brothers living in Pakistan, and turned them over to the United States. They had criticized the Pakistani government’s support for the Taliban. “I am not an enemy of the United States,”

said Muslim Dost at his tribunal. “I am against the Pakistanis. I think the Pakistanis sold me to you and all of these wrong allegations were made by the Pakistanis.”

Many European and North African detainees became detainees merely because they passed through Jalalabad’s “House of the Algerians,” a house run by Omar Chaabani, a man allegedly close to Osama bin Laden. But of those suspected for this association, many had gone there for pedestrian reasons—such as to study—and never trained there; others never actually stayed at the house or even went to Jalalabad.

By late February, there were 450 processed prisoners captured, including dozens from such Afghan-run prisons as Sheberghan. At Dolangi, fifty-five miles southwest of Kandahar, Camp Rhino opened to house prisoners captured in the Afghanistan war. When Hamid Karzai, chairman of the Afghan Interim Authority and later president of Afghanistan, attempted to give amnesty to all prisoners, Rumsfeld forced him to back down. During their detention in Afghanistan, prisoners could not freely speak with one another under penalty of beatings, according to some released prisoners. Others reported being forced to endure stress positions for hours on end, threatened with shooting if they moved, urinated upon, forced to walk on barbed wire, blinded with broken glass, subjected to extreme cold, hung by their wrists and beaten, bitten by military dogs, mocked and denied medical treatment, and deprived of sleep.

A very common theme in the detainees’ treatment was the disrespect of Islam as their captors forced them to strip naked, fondled them sexually, and desecrated copies of the Koran in their presence. Several prisoners later expressed surprise that Americans could ever do this to people. Although Chris Mackey, an interrogation leader, had made clear the Geneva Conventions applied in interrogations, they still involved psychological manipulation and deception, and extreme physical abuses continued before and after interrogation. Under other interrogators, detainees had it worse. One reported having boiling liquid poured on his head, cigarettes put out on his wrists and feet, and petrol injected into his rectum. Interrogators remained frustrated as many prisoners refused to break down and confess to more than seeking marriage or devout Muslim teaching when they came to Afghanistan. Some eventually confessed to knowing Osama bin Laden just to stop the torture. The majority of those detained at Kandahar ended up at Guantánamo.

Along with those captured crossing the border, 120 got apprehended between September 2001 and July 2002 throughout Pakistan. On January 11, 2002, the first 20 prisoners came to Guantánamo Bay. By February, the prison camp held 220, with 237 more on the way.

On March 21, 2002, the Defense Department established procedures for the tribunals with Military Commission Order No. 1. They would have three to seven members, judge-advocates of the armed forces would serve as both the defense attorney and prosecutor, and the judge presiding over the tribunal had discretion.

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over evidence. The standard for conviction would be “beyond a reasonable doubt,” the government would not finance independent defense attorneys, and only two-thirds of the vote was required for conviction, although the death penalty required a unanimous ruling by seven members. The procedures charged the attorney general with ensuring that there were no clear errors of law, and he or the president would approve the final decisions.\footnote{Department of Defense, “Military Commissions Order No. 1,” March 21, 2002.}

In October 2002, the CIA gave a secret report to the White House indicating that most Guantánamo detainees did not belong there.\footnote{Hafetz, Habeas Corpus After 9/11, 37.} Years passed before many of them were released. The Bush administration continued to insist on the importance of having a free hand to detain subjects indefinitely and determine the parameters for military trial, as well as to interrogate detainees with broad leeway as to the methods used.

\section*{INTERROGATION IN THE LEGAL BLACK HOLE}

Initially, although Guantánamo had the declared purpose of isolating soldiers from the field much like traditional POWs, it had more important motives behind it. The main goal at first was to gather information through military means. The Defense Department saw it as an intelligence tool. As Joseph Margulies, defense attorney of Mamdou Habib, an Australian imprisoned at Guantánamo and lead counsel in \textit{Rasul v. Bush} (2004), explained it:

We cannot have a meaningful critique of the Detention Policy [at Guantánamo and elsewhere] unless we understand it from their perspective and unpack the assumptions that lie within it. . . . To understand the Detention Policy you really need to understand two things. The first is that the [Bush] Administration, not without some justification, . . . perceives 9/11 as an intelligence failure. What it represented to them . . . is that the methods by which we [had previously] penetrated Al-Qaeda were ineffective. . . . [T]hey believed . . . that in order to prevent the next wave – and you recall on 9/11 we don’t know . . . for a while how many planes were in the air . . . and they were gripped with . . . visceral fear. We didn’t know what we didn’t know, as Donald Rumsfeld said . . . And frankly almost every post-9/11 initiative that the Administration has put forward has been geared towards that objective . . . gathering as much data as we can. [As with the NSA wiretapping program] the overarching objective is to vacuum up information . . . What they want to create is a world in which they know everything about al Qaeda and its various virile manifestations. . . .

The second thing you need to know is that they wanted to approach this intelligence challenge with a military response.\footnote{Joseph Margulies, “Legal Idiocy and the War on Terror,” speech given at the Future of Freedom Foundation conference, “Restoring the Republic: Foreign Policy & Civil Liberties,” in Reston, VA, June 2007. Transcript and video available at http://www.fff.org/classroom/main.html#margulies.}
In the past, the government approached such terrorist threats with traditional law and order methods. “There was the prosecution of the first World Trade Center bombing . . . The Embassy bombings . . . in ’98 led to prosecutions in 2000.” But this time, the Bush administration for the most part “jettisoned this perspective” and went for a more militaristic strategy.\(^{48}\)

This meant, at first, that no lawyers had access to the prisoners. The administration crafted each detail to elicit hopelessness, down to the prisoners’ orange jumpsuits – “in many Muslim and Arab countries . . . orange prison garb is worn by prisoners who have been condemned. And the prisoners when they first came to Cuba – they thought they were brought here to be executed.”\(^{49}\)

In order to have a free hand at interrogation, the administration sought a model to avoid both POW safeguards and judicial due process. Yet, at the same time, the administration wanted to treat the prisoners as criminal suspects whose legal status the military would determine. The “legal black hole” intended to have all the benefits of both wartime powers and law enforcement and none of the setbacks.

The Uniform Code of Military Justice (UCMJ) constrains military interrogations in ways that proved unacceptable to the administration. Indeed, as it concerns the humane treatment of detainees, the UCMJ might have provided a stronger bulwark than criminal procedure: “By 2001, the UCMJ’s court-martial system could plausibly boast that it provided more robust protections to defendants than did the civilian justice system,” according to Jonathan Hafetz.\(^{50}\)

In the fall of 2002, David Addington, adviser to the vice president; William J. Hayes, general counsel to the Pentagon; CIA attorney John Rizzo; and others spent weeks outlining new interrogation practices. CIA associate general counsel Fredman shared the experiences of his agency, which had engaged in brutal interrogation methods that he argued did not technically rise to the level of “torture.” Major General Michael Dunlavey, commander at Guantánamo, requested permission for nineteen techniques not approved in the Army Field Manual. Diane Beaver, a military judge advocate general, circulated a memo recommending practices

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\(^{48}\) Margulies, “Legal Idiocy and the War on Terror.” Margulies continues: “So the question one needs to ask in order to understand this world is what environment do they want to create in order to get intelligence from people that are going into their custody? Because they knew from very early on, they knew September 12\(^{th}\) that there was going to be a military response . . . And if there’s boots on the ground every military planner knows you’re going to have prisoners; and if you have prisoners you have the capacity to extract intelligence . . . . So the question is . . . what environment one creates . . . to get that information from prisoners . . . . They came to the conclusion that you need to create a particular kind of environment to maximize the intelligence gathering process, the interrogation process, and that is an environment characterized by anxiety, fear, debility, dread. It is an environment of such overwhelming tension that the belief was you could create such a sense of turmoil in the prisoner that they would lose any capacity they have to resist . . . . You need to skew the odds in favor of the interrogator by weakening the prisoner, and you weaken him psychologically, you weaken him morally, you weaken him physically . . . . It translates into a very deliberate creation – very deliberate, everything about Guantánamo was extraordinarily deliberate – of an environment of hopelessness and fear.”

\(^{49}\) Margulies, “Legal Idiocy and the War on Terror.”

\(^{50}\) Hafetz, *Habeas Corpus After 9/11*, 17.
including stress positions, isolation, extreme temperatures, and interrogators pretending to hail from vicious regimes that tortured. On March 14, 2003, Yoo presented a memo to Haynes that “was intended to provide the Defense Department with the same legal cover that his earlier 2002 ‘torture memo’ had given the CIA.” Yoo approved thirty-five interrogation methods. On April 16, 2003, Rumsfeld, based on these findings, handed down instructions for the interrogations at Guantánamo.

Meanwhile, the military tribunals slowly took form. On February 28, 2003, the Defense Department listed crimes that would apply at Guantánamo tribunals, and Rumsfeld said these would extend to Iraq as well. The order made no mention of the UCMJ, and the National Association of Criminal Defense Lawyers complained that the executive branch was usurping the legislative function of designating actions as criminal. The NACDL also noted that because the “document did not preclude trial for crimes that occurred prior to its effective date,” it raised “the specter of ex post facto hearings.” On April 30, the government made changes to address this defect and other subjects of criticism.

More instructions came for the tribunals on April 30. On December 20, Instruction No. 9 established review panel procedures. At the end of the year, the Pentagon appointed four civilian lawyers to sit on the review panel, temporarily giving them the rank of general to keep them under the military. The panel had the authority to send back cases or dismiss charges.

In early 2004, five military defense lawyers, assigned to Guantánamo Bay, filed amicus briefs to the Supreme Court arguing for the right to appeal military commissions decisions to civilian courts, lest the president wield “monarchical” power. Major Michael Mori, one of the attorneys, argued that foreigners could use such a skewed system against Americans one day and that the system was “not set up to provide even the appearance of a fair trial.” Another attorney, Lt. Col. Sharon Shaffer, an Air Force judge until she was assigned a Sudanese defendant, voiced “great concerns about whether he can receive a fair trial with rules that are written that are twisted against the defense.” She found it unfair that “the same officer who approved the charges” also reviewed motions. Indeed, that same officer said he did not “object to defense counsel challenging the system.... Their job is to zealously defend their client.” Unlike many Americans who, at the time, could not stand the smallest concession to these defendants, even the officer presiding over the rigged system saw the necessity of a robust defense counsel.

51 Hafer, Habeas Corpus After 9/11, 40–1.
By petition to federal court, Lieutenant Commander Charles Swift complained that the tribunals violated U.S. and international law. They failed to respect attorney-client privilege and allowed the withholding of exculpatory evidence. On February 5, however, new rules permitted trial delays and prescribed that defense attorneys be alerted when spied upon. Nevertheless, it soon became difficult to find defense attorneys willing to work under such constraints. Private attorneys had to finance their own trips to Guantánamo. However, an initial policy that civilian lawyers could only do casework at the base was lifted.

On July 3, 2003, Bush named six people eligible for tribunal, pending approval by Deputy Defense Secretary Paul Wolfowitz, and then later by Major General John D. Altenburg, the appointed authority over the Guantánamo military commissions. One of those designated was David Hicks, an Australian inmate who became the first convicted of terrorism-related charges by military commission.

At a joint press conference with British Prime Minister Tony Blair on July 17, 2003, President Bush shared an exchange with reporters typifying the tension between the doubt that befits a system of rule of law and the certainty of guilt that characterizes executive despotism. When asked, “Do you have concerns they’re not getting justice, the people detained there?” Bush responded, “No, the only thing I know for certain is that these are bad people.” When a reporter asked the follow-up question, “Mr. President, do you realize that many people hearing you say that we know these are bad people in Guantánamo Bay will merely fuel their doubts that the United States regards them as innocent until proven guilty and due a fair, free and open trial?” Bush responded, “Well, let me just say these were illegal combatants. They were picked up off the battlefield aiding and abetting the Taliban. I’m not trying to try them in front of your cameras or in your newspaper.”

Of particular concern to many were the detained citizens of such friendly nations as the United Kingdom. Bush avoided answering the question as to whether British detainees would “face British justice, as John Walker Lindh faced regular American justice.” That month, however, the United States showed favoritism to its close ally, allowing British officials involved as defense attorneys and judges in the tribunal, delaying the proceeding, and allowing Brits, as well as Australians, to return to face punishment in their home countries, rather than the death penalty or further imprisonment at Guantánamo.

In February 2004, the government finally filed charges against some detainees at Guantánamo, charging Ali Hamza Ahmed Sulayman al Bahlul of Yemen and Ibrahim Ahmed Mahmoud al-Qosi of Sudan with conspiring with Osama bin Laden. The trials were scheduled for August 4. The Supreme Court would eventually

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56 Fisher, Military Tribunals, 189.
57 “President Bush, Prime Minister Blair Discuss War on Terrorism,” Press Conference of President Bush and British Prime Minister Tony Blair, White House Office of the Press Secretary, July 17, 2003.
58 Ibid.
59 Fisher, Military Tribunals, 190–2.
weigh in, but not until after Americans got a glimpse of the underbelly of U.S. detention policy.

**ABU GHRAIB AND THE U.S. TORTURE STATE**

The interrogation practices and treatment of detainees meted out by U.S. custodians in many venues in the war on terror qualify as torture materially and legally, and are prohibited by both U.S. federal and international law. Awareness of the brutality became public in April 2004, when the press published photos of abuse at Abu Ghraib prison in Iraq. They showed prisoners being threatened with dogs, forced into stress positions, sexually abused, stacked into pyramids, and beaten to the point of death. The prison abuse scandal became a major media issue. Abu Ghraib, Saddam Hussein’s own notorious torture chamber, had reopened for business under U.S. authority. Much of the world looked on in horror, but the president’s defenders made light of it. Some even compared the documented abuse to fraternity hazing. Radio commentator Rush Limbaugh compared it to “anything you’d see Madonna, or Britney Spears do on stage.”

Nevertheless, the scandal provided new context to Bush detention policy. New reports emerged about the extent of torture used in the war on terror. The Red Cross concluded that 70 to 90 percent of Iraqi detainees were captured and detained “by mistake.” According to reports from *The Boston Globe*, *Asia Times*, and *The New York Times*, the number of Iraqi detainees ranged from 8,000 to 12,000. The new awareness of the abuses in Iraq and elsewhere brought new attention to Guantánamo, where U.S. officials first developed and used the interrogation policies later employed at Abu Ghraib.

At Guantánamo, prisoners were strapped down to a gurney for their interrogation. They faced intimidating guards who, according to detainee Shafiq Rasul, would say, “We could kill you at any time.” At Camp X-Ray, there were scorpions and snakes; at Camp Delta – the major detention center at Guantánamo – there were giant “banana rats.” Many detained there suffered dysentery and other afflictions.

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63. Bob Drogin, “Most ‘Arrested by Mistake’: Coalition intelligence put numbers at 70% to 90% of Iraq prisoners, says a February Red Cross report, which details further abuses,” *LA Times*, May 11, 2004.


The Extreme Reaction Force, a five-man riot unit, inflicted particularly severe violence against unruly prisoners. “They wouldn’t let us call for prayers,” said detainee Mohammed Saghir, “I tried to pray and four or five commandoes came and they beat me up.” Tarek Dergoul described the experienced of being “ERFed”:

They pepper-sprayed me in the face and I started vomiting... They pinned me down and attacked me, poking their fingers in my eyes, and forced my head into the toilet pan and flushed. They tied me up like a beast and then they were kneeling on me, kicking and punching. Finally they dragged me out of the cell in chains...

Shafiq Rasul described the ERF beating of mentally ill detainee Juma al-Dossari:

When the door was unlocked [the guard] ran in and did a knee drop onto Juma’s back just between his shoulder blades with his full weight. He must have been about 240 pounds in weight... [he] grabbed his head with one hand and with the other hand punched him repeatedly in the face and smashed it onto the concrete floor.

In July 2004, a spokesman for Guantánamo, when asked about video evidence taken of ERF sessions (each one had been filmed to monitor abuses) said that “only 32 hours” of footage revealed “excessive force.” Still, much of America remained in denial, and the administration continued to cover its torture tracks. As Joseph Margulies wrote in 2006:

Sometimes the attempt to obscure the details of the detention policy relies not on deception, but on outright resistance to oversight. Human Rights Watch, whose reporting about prison conditions in other countries has been relied upon by the State Department, has requested access to the Guantánamo base every year since 2002, without success. Also since 2002, the U.N. special rapporteur on torture has asked to visit Guantánamo but until very recently had not received a reply from the United States. In October 2005, the Bush Administration finally announced it would allow this delegation to visit this base, and said it had nothing to hide. Yet Secretary Rumsfeld attached a qualification to the announcement: the U.N. monitors would not be allowed to speak with any prisoners about their treatment.

The horror stories at Guantánamo take center stage in understanding the importance of habeas corpus after 9/11. Without such a legal process, many of these details might have never been discovered. Even more important for the individuals involved, without a meaningful legal process to show they do not belong there, what is at stake is not only the liberty to live outside of prison walls, but also the right to be free from levels of abuse that could only be seen as inhumane.

At the same time, the courts have had trouble reaching even greater abuses, such as in prisons even further removed from the legal system than Guantánamo. Tens of thousands of detainees passed through U.S. custody in Iraq – many of them subjected to cruel conditions and none of them with recourse in the court system.

For others, habeas corpus never became an effective remedy or anything close, and even many defenders of extensive habeas protections rarely argue that it should. This demonstrates the limits in federal habeas so long as the popular culture tolerates a foreign policy of imperial detentions.

During the war on terror, detainees spent time in black sites – secret prisons in Eastern Europe, Afghanistan, and elsewhere – and suffered torture without any legal venue to petition for their freedom. Others became victims of “extraordinary rendition,” a program in which the United States sent captives to foreign regimes that practice torture, where they faced even harsher interrogation than prisoners have endured in U.S. prison camps. In January 2005, Bush insisted that “torture is never acceptable, nor do we hand people over to countries that do torture.” His statement did not jibe with the facts. At least seventy, and as many as several thousand, have undergone extraordinary renditioning, some of them beaten savagely or genitally violated with razorblades.⁶⁹

⁶⁹ Hafetz, 52–65.
The Dance of the Court and the Executive

There is no express grant of habeas in the Constitution. There is a prohibition against taking it away.

– Attorney General Alberto Gonzales

In 2004, 2006, and 2008, the Supreme Court issued opinions that some people celebrated and others condemned for hemming in executive detention power. In each instance of repudiating administration policies, however, the Court’s decisions had conciliatory elements and even provided guidelines on how to circumvent meaningful habeas review. Ultimately, none of these decisions resulted in the revolutionary strike against the executive that its champions hoped for or its detractors feared.

The first confrontations between the Bush administration and the Supreme Court over habeas corpus in the war on terror were seen as dramatic and Manichean struggles between light and darkness – both by those who considered the administration the protagonist and those who instead rooted for the Court. But in fact, the Court’s early repudiations of Bush’s policies tended to turn on relatively narrow questions, and even when they served as principled rejections of executive prerogative, they only encouraged the administration to find new ways to carry on with essentially the same policies. What is more, these early cases of the post-9/11 era imposed conditions on the administration that it later satisfied, forcing the Court to find other ways to strike down detention policy abuses, coming off as inconsistent in the process. At first, the Court found itself on the defensive, attempting to practice due deference to the presidency and only seeking official congressional approval for the executive’s actions. It also suggested procedural ways for the executive to comply with the law, serving to accommodate executive detention as much as challenging it. Later, the

Court claimed broader powers over executive detentions, although the executive eventually circumvented these as well.

In late 2003 and early 2004, the Supreme Court granted certiorari to the three enemy combatant cases, and on June 28, 2004, issued its first three decisions concerning habeas corpus and the war on terror. The decisions carried significant implications for the future of American law and justice but also revealed the shortcomings of habeas corpus as an effective means of constraining the executive.

In Rumsfeld v. Padilla, the Court was asked to decide whether the Authorization for Use of Military Force (AUMF) authorized the president to designate American citizens as “enemy combatants” and detain them without judicial oversight. The Court did not decide this issue, but instead overturned the Second Circuit and remanded the case, finding Padilla’s habeas application incorrectly filed, determining that jurisdiction properly belonged with the U.S. Court for the District of South Carolina, and finding the proper respondent to be the commander of the military brig where Padilla was held, rather than Defense Secretary Donald Rumsfeld. Appendix D provides a full analysis of this decision.

In February 2005, in accordance with the Supreme Court decision, the South Carolina U.S. District Court granted Padilla’s petition for habeas corpus. The judge held that Padilla could not be detained under AUMF, that he was protected by the Non-Detention Act, that Padilla had been captured not on the battlefield, but at O’Hare International Airport, and detained under questionable circumstances as a “material witness” in an unknown case.

The administration responded with an appeal to the Fourth Circuit Court. The Supreme Court denied Padilla’s request for an expedited certiorari review. The Court of Appeals reversed the District Court’s decision, holding “that the President does possess [“the authority to militarily detain” Padilla] pursuant to the AUMF Joint Resolution.” Padilla’s attorney Donna Newman filed a petition for certiorari with the Supreme Court. The administration responded by filing criminal charges against him: eleven counts of supporting terrorists and conspiracy to commit “murder, maiming [and] kidnapping” of people overseas. The administration argued that these charges made the petition for certiorari moot, because Padilla now faced formal charges. At the same time, the administration claimed it maintained the right to redesignate Padilla an enemy combatant and return him to military custody.

In December 2005, the very conservative Fourth Circuit Appeals Court expressed its irritation toward the administration’s attempts to avoid final Supreme Court review, and denied the administration the right to transfer Padilla from military to civilian custody. The administration appealed the Fourth Circuit’s decision to the Supreme Court, complaining that the court had conducted “an unwarranted attack on the exercise of Executive discretion.” The Padilla attorneys now found themselves in the strange situation of filing a brief with the Supreme Court siding

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3 Ball, 133–4.
with the very conservative Fourth Circuit. The Supreme Court sided with the administration, overturning the Fourth Circuit’s obstruction of the administration’s opportune transfer. In doing so, it was also technically siding with the principle of habeas corpus asserted by the District Court when it demanded that Padilla be charged with a crime or let go.

A divided Supreme Court then denied certiorari. Ginsburg wrote a dissent from the denial, complaining that the executive was claiming unduly vast powers, even if Padilla was for the time being back in the federal court system. Roberts, Kennedy, and Stevens concurred with the denial but emphasized that their openness to future requests for certiorari concerning Padilla, given his four years of detention thus far without trial.

Padilla and two codefendants pled not guilty. His lawyers requested a competency hearing, arguing that Padilla suffered post-traumatic stress disorder resulting from nearly six years of isolation and interrogation, and was thus incapable of standing trial. He was found competent. In August 2007, he was convicted of terrorism conspiracy charges dramatically different from the alleged plot to detonate a dirty bomb that supposedly justified his “enemy combatant” detention in the first place. In January 2008 he was sentenced to seventeen years in prison.4

Padilla’s story shows that a man can be demonized as the worst kind of criminal, detained for years and tortured, and ultimately imprisoned for many more years for a crime that hardly resembles that for which he was first supposedly detained, all despite the formal protections of habeas corpus and the civil criminal justice.

In Hamdi v. Rumsfeld,5 the Court overturned the Fourth Circuit’s dismissal of Hamdi’s habeas petition. Hamdi was captured in nearly identical circumstances to those of John Walker Lindh, an American citizen swept up in Afghanistan. But unlike Lindh and like Padilla, Hamdi was held as an “enemy combatant.”6

On January 8, 2003, the Fourth Circuit Appeals Court determined that Hamdi had no right to an attorney or to challenge his confinement. The court found that “the Constitution gives the executive branch the responsibility to wage war and that courts must yield to the military.”7 Frank W. Dunham, Jr., a Virginia public defender, prepared the petition for certiorari, raising three questions:

Does the Constitution permit executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theatre of the War on Terrorism and declared by the Executive to be an “enemy combatant”?

Is the indefinite detention of an American citizen seized abroad . . . permissible under applicable congressional statutes and treaty provisions?

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6 See Chapter 11.
7 Ball, 100.
In a habeas corpus proceeding, . . . does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch’s asserted justification of the detention?\(^8\)

The government’s briefs on the merits in the Hamdi case argued that the president had the power to detain enemy combatants due to his constitutional commander-in-chief wartime powers; that Hamdi was indeed an enemy combatant according to the government’s records; that the Due Process Clause does not apply to “captured enemy combatant[s]”; and that the District Court’s suggested alternative proceeding was impractical and constitutionally problematic. Hamdi’s lawyers’ brief reiterated that the Due Process Clause gave Hamdi his day in court and that only Congress could authorize the indefinite detention of American citizens.\(^9\)

In oral arguments, Hamdi’s lead counsel, Frank Dunham, rebutted the argument that it would be a violation of the separation of powers for the judiciary to interfere with Hamdi’s executive detention. The “historical core of habeas corpus is to challenge extrajudicial executive detention,” Dunham argued. “It cannot be a violation of the separations of powers for a . . . court to perform its judicial function of inquiry into a long-term, indefinite detention of a citizen in a habeas corpus proceeding.” So if it is the president’s job to wage war, it is equally the courts’ job to scrutinize his detentions. As for the idea that the AUMF authorized the detention, Dunham argued that it “doesn’t have the word ‘detention’ anywhere in it. . . . When Congress passed the AUMF, it did not say we suspend habeas. Habeas corpus statutes are still on the book. . . . If that is interpreted to mean that he can impose detention on anybody that he thinks is necessary in order to fulfill [the AUMF’s] command, we could have people locked up all over the country tomorrow without any due process, without any opportunity to be heard, because we know that this war that we’re talking about is going on worldwide and it’s going on within our borders.”\(^10\)

In oral arguments, Deputy Solicitor General Paul Clement was asked whether due process required that Hamdi be able to tell his side of the story to an independent tribunal, and responded, “He does have a right to [give his case], in his own words . . . during interrogation. During the initial screening. During the screening in Gitmo. . . . The interrogation process itself provides an opportunity for an individual to explain that this has all been a mistake.”\(^11\) Strangely, he characterized the executive interrogation process as a part of judicial due process.

Because the Supreme Court did not become preoccupied in his case with the narrow jurisdictional questions on which Padilla turned, Hamdi v. Rumsfeld touched on more fundamental issues of detainees’ rights, habeas corpus, the rights of American

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\(^8\) Docket for 03–6696, Yaser Esam Hamdi; Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi, Petitioners, v. Donald Rumsfeld; W.R. Paulette, Commander, Respondents, Petition for Writ of Certiorari, as quoted in Ball, 100–1.

\(^9\) Ball, 104–5.

\(^10\) Ball, 108–9.

\(^11\) Ball, 110–1.
citizens in particular, and the power of the executive to militarily detain individuals as “enemy combatants” on American soil. No majority decision existed, but eight out of nine justices recognized that the executive could not detain American citizens without some due process protections. Appendix E contains a full analysis.

The Bush administration refused to give Hamdi a civil hearing as demanded by the Supreme Court. Therefore, the Bush administration struck a deal with Hamdi’s lawyers in September 2004. He renounced his U.S. citizenship, returned to Saudi Arabia, and forfeited his right to sue the United States for his detention or to travel to the United States, Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank, or the Gaza Strip.12

The Supreme Court’s boldest decision of the day was Rasul v. Bush.13 While the other two decisions handed down on June 28, 2004, concerned American citizens detained at home, Rasul v. Bush pertained to non-citizens detained arguably outside of U.S. jurisdiction at Guantánamo Bay. The main issues before the Court were whether the Court had jurisdiction in the first place, and what should be done, if anything, about the lack of Geneva Article 5 hearings to determine whether these detainees were POWs, illegal combatants, or merely innocents caught up in the wrong place at the wrong time. Amicus curiae – “friend of the court” – briefs to the Supreme Court in support of the detainees were filed by retired military officers, Fred Korematsu (who had challenged his own detention during Japanese Internment), Hungarian Jews and Bougainvilleans, and former American prisoners of war.14

Sixteen British, Australian, and Kuwaiti detainees captured during the war in Afghanistan had filed habeas corpus petitions in Washington, DC’s District Court to challenge the legality of their detention. They claimed to be neither terrorists nor enemy soldiers fighting the United States, but rather innocents captured by bounty hunters. They complained that they had not been charged with a crime, been permitted access to counsel, or had their day in court. The District Court dismissed the suits on the grounds that it did not have habeas jurisdiction over Guantánamo, citing the precedent of Johnson v. Eisentrager and concluding that “aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.” The Court of Appeals affirmed the lower court’s decision.

The Supreme Court overturned the lower courts, concluding that the District Court did indeed have habeas jurisdiction. Justice Stevens delivered the majority decision, joined by O’Connor, Souter, Ginsburg, and Breyer. Kennedy gave a concurring opinion, agreeing with the judgment. Scalia delivered the dissent, joined by Rehnquist and Thomas.15 A full analysis can be found in Appendix F.

12 Ball, 132.
14 Ball, 93.
Although *Hamdi* and *Rasul* constituted major setbacks to the administration, and as much as presidential supremacist Justice Clarence Thomas objected to both decisions, they were very limited in scope and came with serious caveats, reservations, and concessions to the administration. Jonathan Hafetz, trenchant critic of Bush’s abuses of habeas corpus, was reserved in his optimism:

While these decisions affirmed the important role of the federal courts in limited executive power in the “war on terrorism,” they also left important questions unresolved. The Court did not decide, for example, whether a citizen – or, indeed, any individual – seized and detained in the United States, as in *Padilla*, could be held by the military as an “enemy combatant.” Instead, it reached only the question of the executive’s detention authority in the narrow circumstances presented by *Hamdi*, where the individual was seized in a combat zone in Afghanistan. Nor did the Court decide the merits of the claims of the Guantanamo detainees. More generally, the Court never provided a coherent theory explaining why citizenship should determine the scope of constitutional protections for those classified by the executive as “enemy combatants.”

For hundreds of years the executive responded to those who attempted to restrain it by the chains of habeas with appeals to legislation, clever tricks of circumvention, and the simple gall to ignore what the judges demanded. In the midst of *Padilla*, *Hamdi*, and *Rasul*, the struggle over habeas corpus in the war on terror had only begun. President Bush reacted and the dance began.

**THE IMPERIAL EXECUTIVE STRIKES BACK**

After the 2004 Supreme Court decisions, the aftermath for Padilla, Hamdi, and the Guantánamo detainees underscores the hard-won struggle for detainees’s rights even when the judiciary appears favorable. Upon seeing Hamdi’s habeas corpus rights upheld, the administration had him deported to Saudi Arabia to avoid the embarrassment of a District Court ordering his release. Upon seeing Padilla’s case remanded with the implication that all he lacked was standing, and fearing that habeas corpus relief would arise once the proper respondent was named in the proper court, the administration acted to make the issue moot. As far as those at Guantánamo were concerned, the administration simply worked to legalize its illegal detention policy without fundamentally changing it, exploiting the decisions’ narrow holdings, the lack of detail, and the failure of the Court to produce a clear anti-executive majority opinion.

In circumventing the spirit of *Rasul v. Bush*, the administration neglected to tell detainees of their rights to an attorney and argued cases in federal court nearly identical to the ones it lost earlier that year. Meanwhile, it followed the letter if not

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17 Ball, 128.
the spirit of the decision’s vague order. In July 2004, Deputy Defense Secretary Paul Wolfowitz responded to the somewhat vague demands in *Rasul v. Bush* by issuing an order creating Combatant Status Review Tribunals (CSRTs) – hearings before three military officers uninvolved with the detainee’s capture, interrogation, or other reviews to determine the detainee’s status as an enemy combatant or otherwise. The detainee was allowed a personal representative. The government’s evidence enjoyed a rebuttable presumption of truth.\(^{18}\)

Ironically, by obeying the Court, the order only solidified the shadowy language of “enemy combatants,” defining one as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or who has directly supported hostilities in aid of enemy armed forces.”\(^{19}\)

Overall, 96 percent of the CSRTs had no witnesses or documentary evidence, and in more than half the cases when the detainees’ counsel made substantive comments they advocated *against* the detainees. Within two months of formation, most CSRTs were completed, with 38 out of 558 detainees deemed to be “no longer enemy combatants” – as opposed to simply “innocent.” Yet many of them, including some cleared by the ARBs, were still not allowed to return home.\(^{20}\)

In the summer of 2004, Joyce H. Green, judge of the U.S. District Court for Washington, DC, ordered that the Department of Justice respond to the habeas corpus challenges of more than sixty detainees filed in her court by October 4, 2004, and that the Defense Department submit facts obtained at the status review process by October 18. The administration dragged its feet for months as the substantive rights of more than 500 Guantánamo detainees hung in the balance. The attorneys of sixty detainees challenged the newly created status review process, and in January 2005 Green found the process unconstitutional and ruled that the detainees had a right to challenge their detention through habeas processes in U.S. district court. In response to the ruling on unconstitutionality, the Defense Department created administrative review boards (ARBs), panels of three military officers, to determine the status of detainees without the advice of counsel.\(^{21}\)

Much has been made of President Bush’s retreat from precedent in creating the military commissions. The 2004 Supreme Court repudiation of the president’s policy fell in line with the important yet narrow arguments made by many critics who claimed that Bush could not legally act on his own. The idea that Bush had deviated from the precedents of previous wars, such as the War of 1812, the Civil War, and World War II,\(^{22}\) had its share of validity. Surely, Bush acted especially

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18. Ball, 129.
22. Katyal and Tribe, 1277–98; Ball.
unilaterally and, one could argue, lawlessly. But in attempting to contrast Bush with the supposedly superior legal processes of past presidents, legal theorists risk unnecessarily legitimizing those past actions, opening the door to a system that, if superior and less lopsided than the original Bush policy, still endangers habeas corpus and the rights of unjustly apprehended and mistreated detainees.

In particular, critics who focused on the absence of Congress in formulating the commissions system had a sound argument later vindicated by the Court, but, on the other hand, the Court also effectively suggested to the president what he might do to make his system “legal.”

“The need for independent habeas corpus review should independently drive Congress to act even if political inertia would otherwise lead it to remain inactive,” wrote Katyal and Tribe. But what if Congress believes habeas review is inappropriate? “Congress will need to establish fair procedures for habeas review and to vest lower courts with jurisdiction to hear these cases.” But what if those procedures are no fairer than the president’s? Given the limited nature of habeas corpus even absent efforts to undermine it, “without close congressional attention, habeas review would provide little beyond a fig leaf.” But what if close congressional attention makes it a fig leaf? Indeed, it seems indisputable in light of American legal traditions that “the language of the [president’s] Military Order cannot by itself restrict habeas review, given the ‘longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.’” But what if Congress decides to repeal that jurisdiction itself?23

In response to the Court’s rejection of Bush’s commissions, the administration set out to circumvent the meaningful power of habeas corpus by taking the Court’s advice on how to make its illegal program less illegal. Bush went to Congress and asked for legislation to let him do what he was already doing.

THE DETAINEE TREATMENT ACT

In the summer of 2005, Senator John McCain proposed an amendment to the 2006 defense appropriations bill that would ban all torture including by the CIA. Bush made clear he would veto any legislation with such language. Eventually, McCain agreed to allow an exemption for the CIA. The Senate passed the new language by 90 to 9. Bush signed it on December 30, 2005, issuing a signing statement essentially saying the anti-torture language was invalid.24

Also in December 2005, the president succeeded in getting Congress to pass the Detainee Treatment Act (DTA). The law stripped jurisdiction over habeas corpus for Guantánamo Bay for all courts except the U.S. Court of Appeals for the District of Columbia, which was given “exclusive jurisdiction to determine the validity of any

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24 Ball, 139–40.
final decision of a CSRT that an alien is properly detained as an enemy combatant.” Otherwise, “no court, justice, or judge shall have jurisdiction to hear or consider – (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.” The legislation also took away the courts’ capacity to take other actions on the behalf of these detainees.

Moreover, the jurisdiction of DC’s Court of Appeals was limited to determining whether the CSRTs operated in accordance with Defense Department procedures – including a preponderance of evidence standard, where the government’s evidence enjoyed the rebuttable presumption of truth – and whether the process’s determination was constitutional. This meant the Appeals Court could review very few facts of a case. Without a strong habeas corpus review process, the McCain amendment lacked teeth.

Although Senator Graham, the author of the legislation, promised Congress that the DTA would have no retroactive effect, he agreed with the administration that the law would affect not only future habeas cases but also pending cases, including the

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in the U.S. District Court for the District of Columbia. The next judicial rebuke of Bush’s policies turned on the legitimacy of such retroactivity, as well as on the general legitimacy of the CSRTs.

HABEAS CORPUS SHINES LIGHT ON THE BLACK HOLE

Thanks to habeas corpus and the resulting light shed on the detainees’ situation, new information became available to the public that contradicted administration assertions that Guantánamo primarily housed “the worst of the worst.” Mark Denbeaux, professor at Seton Hall University Law School, and his son Joshua, both attorneys for two Guantánamo detainees, issued a report in early 2006 based on the government’s own data. They found that 55 percent of the detainees had not been “determined to have committed any hostile acts against the United States or its coalition allies”; “Only 8 percent of the detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40 percent have no definitive connection at all and 18 percent have no definitive affiliation with either al Qaeda or the Taliban”; only 5 percent of the total were caught by U.S. forces – 86 percent “were arrested by either Pakistan or the Northern Alliance and turned over to United States custody”; and many of those “deemed not to be enemy combatants – mostly Uighers – are in fact accused of more serious allegations than a great many persons still deemed to be enemy combatants.”

26 Ball, 139–44.
After four years of detention, “only approximately 10 [had] been charged with any crime related to violations of the laws of war.”\(^{28}\) As for the new CSRTs set up by the DTA, the authors found them seriously tilted toward the government’s presumption of guilt. The CSRT defined an “enemy combatant” as:

> [A]n individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy forces.\(^{29}\)

Although a dozen or so detainees had genuine and serious al Qaeda connections, including eleven who swore loyalty oaths to Osama bin Laden, mere members or “associates” of the Taliban were another story. “Many of the detainees held at Guantanamo were involved with the Taliban unwillingly as conscripts or otherwise.” Taliban conscripts included children as young as twelve. Examples of proof of enemy combatant status included: “Associations with unnamed and unidentified individuals and/or organization; Associations with organizations, the members of which would be allowed into the United States by the Department of Homeland Security; Possession of rifles; Use of a guest house; Possession of Casio watches; and Wearing of olive drab clothing.”\(^{30}\)

One of the greatest effects of the 2004 Rasul decision was to shed some light on the situation at Guantánamo and show that the administration had played with the truth when it described the detainees as “the worst of the worst.”

### HAMDAN, THE MILITARY COMMISSIONS ACT, AND BOUMEDIENE V. BUSH

After the Bush administration responded to Rasul with the adoption of the DTA, the controversies persisted. The executive branch had, in a sense, satisfied certain conditions as required by the Court, and in doing so forced the judiciary and habeas partisans to go on the offensive in finding new ways to attack the administration’s policies. In 2006, a Supreme Court case considered the interplay between the Geneva Convention, the Uniform Code of Military Justice, and U.S. detention policy, as well as the power of the executive to act on its own to designate detainees as enemy combatants. The administration again responded by going to Congress for legislative approval of its detention policy without meaningful habeas corpus oversight. The last year of the Bush administration saw the Court finally question its Guantánamo policy not on the technical grounds of earlier decisions, or on the statutory reach of habeas, but on the common law reach of habeas as guaranteed in the U.S. Constitution. Thus, in a sense, we can describe the Court’s approach to

\(^{28}\) Ibid., 5.

\(^{29}\) Ibid., 7.

\(^{30}\) Ibid., 16–17.
the detention issue as becoming more radical, more on the offensive than defensive, than in the first years of the war on terror. Yet these Court cases, and Bush’s response to them, reinforces our understanding of the writ as a fickle mechanism, whose application is tainted by technical legalisms, complicated by seemingly valid conflicting interpretations of constitutional construction, and frustrated by an executive determined to circumvent the writ’s authority through time-tested means.

Hamdan v. Rumsfeld

Unlike the vast majority of detainees at Guantánamo, Salim Ahmed Hamdan actually worked for Osama bin Laden. A Yemeni national, he was Osama’s driver and bodyguard from 1996 to 2001. In November 2001, Afghani militia captured him and delivered him to the U.S. military. Shortly thereafter he was sent to Guantánamo, and on July 3, 2003, he became the first prisoner, along with five others, scheduled for a military commission.

One year later, in July 2004, Hamdan was finally charged with crimes: associating with people conspiring to commit murder, destruction of civilian property, and terrorism. The charging document cited Bush’s November 13 Order and his determination that Hamdan was eligible for a military commission trial. A CSRT determined that he was affiliated with al Qaeda. The military trial began in August, but was stopped short by the civil judiciary. Judge James Robertson of the U.S. District Court for DC halted the proceedings. Hamdan had petitioned for a writ of habeas corpus, which complained that “conspiracy” was not an internationally accepted violation of the law of war and that the procedures used to try him violated military and international law, including the principle that he may confront the evidence against him.

The judge accepted his petition for a writ of habeas corpus on the grounds that no competent tribunal had classified him an offender triable under the laws of war. He found fault in the president’s unilateral creation of military commissions. Citing the Third Geneva Convention, the judge said a court martial, not the president, is required to try people whose POW status is unknown and that the commissions violated the Uniform Code of Military Justice. He also objected to the deprivation of the detainee’s right to confront his accuser, to have a fair trial, and to enjoy traditional rules of evidence.

The Defense Department appealed to the federal appeals court, protesting this “unprecedented judicial intrusion into the prerogatives of the president.” In July 2005, a three-judge panel of the U.S. Court of Appeals for the DC Circuit overturned Robertson’s ruling. The panel held that the 2001 AUMF gave Bush the authority he needed. As to the Geneva Convention, two judges, including future Supreme Court Chief Justice John Roberts, said the Convention did not apply at all; the other said it did but was unenforceable by the court. Hamdan’s attorneys filed for a writ of certiorari to the Supreme Court.
The government argued against a certiorari process, calling it an undue interference with presidential power and saying that the military commissions should be allowed to play out before they are reviewed by the court system. In November, the Supreme Court announced it would grant certiorari and hear Hamdan’s case. The justices had two main questions to ponder, whether the president had authority to create the commissions and whether an Article III court could enforce the Geneva Convention through a habeas corpus writ.

Hamdan’s attorneys, Neal Katyal and Lieutenant Commander Charles Swift, primarily argued in their brief that the issue at stake was the separation of powers. They questioned the president’s claim of “unilateral authority to try suspected terrorists wholly outside the traditional civilian and military judicial systems, for crimes defined by the President alone, under procedures lacking basic protections, before ‘judges’ who are his closest subordinates”; his “disregard [for] treaty obligations” and a loose reading of the AUMF that “would provide to the President an almost limitless authority that Congress could not have intended and that threatens our divided government.” Furthermore, they argued that even if Congress had established these commissions, they did not pass constitutional muster, and that, in any event, they violated the Geneva Conventions. The government responded with more of the same arguments about separation of powers, the judicial unforceability of the Geneva Conventions, and the jurisdictional problem presented by DTA. The administration further argued that even without statutory authorization, the president had the inherent authority to create military commissions. Senators Graham and Kyl filed amicus curiae briefs, claiming that Congress had debated the retroactive nature of DTA, justifying this by pointing to remarks inserted into the congressional record that no one had actually heard debated on the congressional floor.

On March 28, oral argument commenced in the Supreme Court’s courtroom. Newly appointed Chief Justice Roberts recused himself for having been involved in the lower court decision. Some of the dialogue is worth examining, for it demonstrates the dual nature of habeas jurisprudence, hanging both on technicalities of legal construction and the more fundamental idea of justice behind the writ.

In oral arguments, Katyal explained that they did not wait until the commission’s conclusion to challenge it because they were “challenging the lawfulness of the tribunal itself. . . . This is a military commission that is literally unbounded by laws, the Constitution, or treaties.” To uphold the commission would be to “effectively replicate . . . the blank check that this court rejected in Hamdi.”

Katyal argued that conspiracy was not an offense traditionally seen as a violation of the laws of war because it was “too vague” under international law, and that “the commission is operated in totally uncharted waters” and should not be allowed to convict people for such violations. Moreover, he said the presidential commissions contradicted the Uniform Code of Military Justice, that the DTA did not retroactively legalize Bush’s military commissions, and that even if it did, conspiracy was not a proper crime for them to try.
Justice Souter criticized the administration for attempting to avoid both judicial oversight and POW protections. Kennedy stressed the core function of habeas in determining jurisdictional legality, suggesting it superseded the administration’s interpretation of statutory limitations. Breyer asked whether it was “constitutional for Congress, without suspending the writ of habeas corpus, to [remove] jurisdiction from the courts?” Clement responded that the DTA’s vesting of post-conviction review jurisdiction with the DC Circuit Court did not “amount to a suspension.”

Most astonishingly, when Stevens asked if Clement was saying the DTA was “constitutional for Congress, without suspending the writ of habeas corpus, to remove jurisdiction from the courts?” Clement responded, “It’s both.” Stevens replied, “Well, it can’t be both! [But] it is your position that [Congress] did not suspend the writ. You’re not arguing that it’s a justifiable suspension of the writ.” To which Clement responded, “Well, I think the terms of the Suspension Clause would be satisfied here because of the exigencies of 9/11. If the question is, Am I taking the position that Congress consciously thought that it was suspending the writ? Then I would say no. . . . And if you think, in order for there to be a valid suspension, Congress has to do it consciously. . . . My view would be that if Congress, sort of, stumbles upon a suspension of the writ, but the preconditions are satisfied, that would still be constitutionally valid.

Souter asked if Congress could “limit jurisdiction without suspending habeas corpus.” He said that because suspension would arguably be “the most stupendously significant act” of which Congress was capable, it would be hard to swallow the “argument that it can be done from pure inadvertence.” Clement began to imply that things were different “if you’re talking about the extension of the writ to enemy combatants held outside the territory of the United States,” at which point Souter interrupted, “Now wait a minute! The writ is the writ. There are not two writs of habeas corpus, for some cases and for other cases.” This reasoning sounds reverent to the spirit of habeas corpus, but the argument is valid that the federal courts do indeed have various habeas corpus writs, due to statutory, constitutional, and common law authority.

Ginsburg noted that retroactively changing the jurisdiction of a pending case seemed extraordinary. Justice Breyer returned to the points that it is questionable to try someone for “war crimes” when it was “not an ordinary war,” that conspiracy charges are not normal in international law, and that there was no emergency, no

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31 Justice Souter accused the administration of trying to “have it both ways”: “If the military commissions are operating under the law of war [and to enforce that law] you’ve got to accept that one law of war here is the Geneva Convention right to a presumption of POW status unless there is a determination by a competent tribunal otherwise.” Solicitor General Clement, speaking on behalf of the argument, responded that he did not “think that the Geneva Convention applies in this particular conflict.”

Justice Kennedy, questioning the notion that the Court should wait until the commission’s completion before intervening, asked whether it must wait “before habeas intervenes to determine the authority of the tribunal to hold and try? . . . I thought that the historic function of habeas is to test the jurisdiction and the legitimacy of a court.” Clement reiterated that the DTA confined review jurisdiction to the DC Circuit Court, and only after conviction” (Ball, 158–9).
interruption of normal civil courts’ operation, that seemed to warrant these military commissions.

Clement repeated the argument that the president has the authority to make these determinations on his own. Katyal reiterated the problem with letting the president treat conspiracy as a war crime and plead the court to “enforce the lawful uses of military commissions and the historic role of this Court.”

On June 29, 2006, the Supreme Court handed down its decision on *Hamdan v. Rumsfeld*. It rejected the government’s motion to dismiss on the grounds of the DTA, citing the legislative history of the DTA and concluding that pending cases fell within its jurisdiction. The Court pointed out that in *Ex parte Quirin*, it had not avoided ruling on the commission until its completion, but rather expedited its review. The Court furthermore found the military commissions unauthorized by Congress and in violation of the UCMJ, the Geneva Convention (especially Common Article 3), and standard rules of evidence; and ruled that post-conviction review in Circuit Court is not sufficient. On the other hand, the Court left intact the president’s power to detain indefinitely without charge, an even more awesome power than the creation of military commissions.

As with *Hamdi*, this case concluded without a majority opinion. Justice Stevens gave the judgment and delivered the opinion joined by Souter, Ginsburg, and Breyer, some of which was also joined by Kennedy. Breyer gave a concurring opinion, joined by Kennedy, Souter, and Ginsburg. Kennedy concurred in part, joined by Souter, Ginsburg, and Breyer. Scalia dissented, joined by Thomas and Alito. Thomas gave another dissenting opinion, joined by Scalia and partly by Alito. Alito gave a dissenting opinion, partly joined by Scalia and Thomas. This case is particularly worth exploring in some detail (see Appendix G), as it demonstrates how a seemingly fundamental question such as habeas corpus can turn on the most particular of nuances, and because of its scope in addressing retroactivity, suspension of habeas, military commissions, presidential powers, and the laws of war.

THE MILITARY COMMISSIONS ACT OF 2006

On July 7, 2006, Deputy Secretary of Defense Gordon England sent a memo to the Department’s leaders acknowledging that the Supreme Court had ruled that Common Article 2 applied to their military commissions. Some believed that change would now come to detention policy. But the administration was busy drafting legislation. That summer, Bush introduced the Military Commissions Act of 2006 (MCA) to Congress.

The new legislation stripped federal courts of any jurisdiction to consider habeas corpus applications submitted by any aliens detained as enemy combatants, or under


33 Hafetz, *Habeas Corpus After 9/11*, 140.

suspicion of being enemy combatants. The language contained a few token concessions to due process: military judges would preside over the trials; tortured confessions would not be admitted; and a detainee’s exclusion from trial would be “no broader than necessary.” Overall, the original draft had everything the administration always wanted in detention policy: “Enemy combatants” could be indefinitely detained without any habeas rights; hearsay evidence could be used unless deemed “unreliable”; military commissions would be preserved; detainees have no guarantee of a “speedy trial”; any evidence the military deemed to have “probative value” would be admissible; evidence obtained through “coercion” would be admissible unless deemed “unreliable” by the judge; habeas petitions would be barred; the Geneva Conventions would not be judicially enforceable. John Yoo remarked on the legislation: “This draft shows that the executive branch doesn’t think the Supreme Court got the questions on the Geneva Conventions right in Hamdan.”

Hamdan’s attorney Neal Katyal said, “Basically, this is trying to overrule Hamdan.” Yet in a sense the administration was obeying Hamdan. The Court told Bush he could not create commissions on his own and that the DTA did not clearly strip habeas corpus from the judiciary. Therefore, now he asked Congress to help him on both fronts.

On September 26, 2006, Leahy, Arlen Specter, and Gordon Smith introduced an amendment to restore habeas corpus rights for foreign nationals in military or CIA custody. It failed. The MCA promised a major impact on torture policy, amending the War Crimes Act of 1996, immunizing government interrogators and those who ordered them for any torture conducted going back to 1996. Republican Senator John McCain and a couple others protested this language and proposed an alternative more deferential toward the rights of detainees. Their proposed amendment restricted secret evidence and incorporated the Common Article 2 definition of torture. It got some traction in the Senate. Bush’s attorneys worked out a compromise, which mostly involved eliminating the allowance for secret evidence. Ultimately, McCain, Warner, and Graham voted, along with almost all Republicans, for Bush’s bill. In this respect, McCain, long viewed as a maverick on the issue of torture, gave his anti-torture stamp of approval to Bush’s torture policy. Meanwhile, the Defense Department claimed to renounce such torture techniques as waterboarding, forced nudity, stress positions, hooding, sleep and food deprivation, and the use of military dogs. The military wing of the executive branch attempted to clean its hands of torture even as the Congress was approving it.

In October, Bush signed the MCA into law. The new law expanded the definition of “enemy combatants” to encompass people who “purposefully and materially supported hostilities against the United States.” It subjected “enemy combatants” to summary arrest, indefinite detention, and a deprivation of habeas corpus. All U.S. military prisons would fall outside of habeas’s reach. MCA deemed inapplicable the UCMJ guarantees of a speedy trial and prohibitions against coerced self-incrimination. It declared that the Geneva Conventions and international law
do not protect military detainees. “Reliable” coerced evidence, as determined by the military judge, would now be allowed. The law granted the president the authority to interpret the Geneva Conventions. During interrogation, few tactics qualified as an offense against the MCA. Lawmakers had considered including rape as an example of torture but rejected it.35

“The paradox is obvious,” writes Howard Ball. “The Hamdan decision forced Bush to ask Congress to legislate. The Republican majorities legislated. And President Bush received, in the MCA of 2006, just what he sought.”36 Immediately, the MCA faced challenges in federal court. In 2008, these culminated in a landmark Supreme Court decision.

THE CONTINUING STRUGGLE

As the debate raged, defenders of the administration and MCA continued to characterize the detainees at Guantánamo as “worst of the worst,” and thus undeserving of procedural safeguards. In particular, they argued that many of those freed had returned to the battlefield to fight Americans. The definition of “returning to the battlefield” was widely construed to include former detainees writing op-eds criticizing detention policy.37 In any event, this criticism appears to implicate the administration’s process that released them, rather than the civil judicial process that the administration had obstructed.

More Seton Hall studies, conducted by Mark Denbeaux and his son Joshua, came out in 2007. Together with their 2006 research, these reports analyzing the government’s own data and determinations about the Guantánamo inmates concluded that “almost everything said by our highest officials about who was detained at Guantánamo and why they were detained was false.”38

Crediting the new information as being available because of habeas corpus, Denbeaux noted that “55 percent of those detained at Guantánamo are not accused of committing a single hostile act,” and “60 percent of those detained are held only because they have an ‘association’ with some group, whether al Qaeda, Taliban, or otherwise.” Moreover, 92 percent of the detainees “were not captured by Americans; 66 percent were not even picked up in Afghanistan and only a handful of detainees were ever accused of shooting any weapons at Americans.” Numerous examples of the evidence provided against detainees claim only that the detainees fled during hostilities and were captured by the Northern Alliance, or that they were cooks or other low-level officials for the Taliban.39 “The Department of Defense

35 Ball, 175–85.
36 Ball, 185.
37 Hafetz, Habeas Corpus After 9/11, 132.
39 Ibid., 2, 6.
considered membership in any of 72 ‘enemy’ groups to be grounds for detention at Guantánamo. The State Department permits members of 52 of those 72 groups entry into the United States.”

While “8 percent of the detainees were characterized by the DOD as ‘al Qaeda fighters,’” of the remainder, “40 percent have no definitive connection with al Qaeda at all and 18 percent have no definitive affiliation with either al Qaeda or the Taliban.”

Although many of the detainees indeed had “associations” with the Taliban – “in the regions of Afghanistan where the Taliban ruled, it would be almost impossible not to have some ‘association’ with the Taliban,” the vast majority were not fighters for al Qaeda or the Taliban. “Fewer than 10 percent conceivably fit that description.” At most, 8 percent were “detainees captured by American troops on the battlefield in Afghanistan.” Overall, 66 percent were not captured in Afghanistan at all.

Of the group associations listed as a reason for detention, 72 percent of those groups were mentioned neither on the Patriot Act Terrorist Exclusion List nor the State Department’s two separate lists of terrorist groups to be excluded from the United States. Despite the label “enemy combatants,” many were not “found anywhere near a battlefield.” In response to the argument that the U.S. government needed to detain non-combatants for interrogation, Denbeaux cited that in the first 39 months of detention, from January 2002 to April 2005, detainees were “interrogated...on average a little over once a month.”

The studies also called the government’s competence into question. The Defense Department claimed it held 759 detainees, yet had more than 1,000 different names on its lists and records. When Mohammad Al Harbi, ISN #333, was told he was detained because his name was on a list of al Qaeda members, he pointed out, “Where I live, it is not uncommon to be in a group of 8–10 people and 1 or 2 of them will be named Mohammed Al Harbi. In fact, I know of 2 Mohammed Al Harbis here in Guantánamo Bay and one of them is in Camp 4.”

Denbeaux pointed out that the isolation and tough treatment at Guantánamo did not seem to fit the low number of disciplinary violations of the detainees, “even the most serious” of which “are offensive but not dangerous. Nearly half (43 percent) of the reported Disciplinary Violations were for spitting on staff.”

The CSRT, set up in response to the 2004 Supreme Court extension of habeas in Rasul, “did not require our government to call witnesses or to produce any unclassified evidence... Only 4 percent of the detainees ever saw any of the government’s
evidence against them. Only 11 percent of the detainees were permitted to produce any evidence in their own defense at their CSRT hearings.”

The “Personal Representatives” provided were not advocates for the detainees, did not meet them often or for substantial lengths of time, and anything the detainees told them was not held to confidentiality – they “may be obligated to divulge it at the hearing,” as one Personal Representative said. As for evidence, no witnesses were ever called, and for 93 percent of the detainees, no documentary evidence ever appeared. Defendants were not allowed to call their own witnesses, except, very rarely, other detainees. The CSRTs “made no effort to ascertain whether evidence claimed to have been coerced was legitimately detained.”

The CSRTs were unfair, an improper replacement for habeas corpus, and unrepairable, Denbeaux argued, because they suffer from a “preordained” result. He quoted a Personal Representative of a detainee who said:

I do not believe the Tribunal gave full weight to the exhibits regarding ISN [redacted]’s truthfulness regarding the time frames in which he saw various other ISNs in Afghanistan. . . . I do feel with some certainty that ISN [redacted] has lied about other detainees to receivepreferential treatment and to cause them problems while in custody. Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban’s children) is an enemy combatant (partly because he slept under a Taliban roof).”

In response to the argument that Guantánamo Bay housed mostly nonviolent people picked up in unfortunate circumstances, the Bush administration began moving more high-profile and plausible terrorist suspects there. In September 2006, the administration relocated fourteen persons, including suspected 9/11 mastermind Khalid Shiekh Mohammed, from secret CIA ghost prisons – detention centers also known as “black sites” where the CIA held as many as 100 detainees outside of public scrutiny since 9/11 – to Guantánamo Bay. These figures became the token examples of truly dangerous people to continue bolstering the claim that the Cuba detention facility held the “worst of the worst.”

AFTER THE MCA

In June 2007, Senators Patrick Leahy (D-VT) and Arlen Specter (R-Pa.) introduced the Habeas Corpus Restoration Act of 2007 to reassert the habeas rights of prisoners in Guantánamo. Although 56 Senators voted for it, Republican opponents filibustered the bill.

48 Ibid., 3–4.
49 Ibid., 11.
50 Ibid., 11–14.
51 Ibid., 18.
In July, two legal experts previously at odds with one another published an op-ed appearing in the *New York Times*. It highlighted the irony that some of Bush’s most prominent critics effectively bolstered the substantive case for executive detention without the full safeguards of civil trial while offering advice on how to make it more legal. Former Bush attorney Jack Goldsmith and Hamdan attorney Neal Katyal wrote: “The two of us have been on opposite sides of detention policy debates, but we believe that a bipartisan solution that reflects American values is possible. A sensible first step is for Congress to establish a comprehensive system of preventive detention that is overseen by a national security court composed of federal judges with life tenure.”

Meanwhile, complaints mounted about Guantánamo. Lawyers protested their exclusion from military trials. The attorney for Omar Khadr, who was captured as a child, complained that the government withheld “potentially exculpatory evidence.” Lawyers for Binyam Mohammed, an Ethiopian-born resident of Britain, said that CIA photos proved torture of their client, who suffered “brutalized genitalia.” “I have seen no evidence of any kind against Mr. Mohammed that is not the bitter fruit of torture,” said Clive Stafford-Smith, the head of his legal team. Hundreds of hours of CIA videotapes showing interrogation and detainee torture had been destroyed. Despite U.S. Intelligence Director John Negroponte’s order to CIA Director Porter Goss not to destroy the tapes in the summer of 2005, the agency now admitted their destruction. In early December 2007, Martin Scheinin went to Guantánamo as a United Nations observer and reported that “the hearings provided graphic illustrations of the practical difficulties in providing fair trials at a distant military base.”

As of November 2007, there had been 778 detainees in Guantánamo, only 320 still remaining. The majority, 450, had returned to their home countries and five Uyghurs had been sent to Albania, despite not knowing the local language. The detainees who remained included a man in his late seventies and a thirteen-year-old boy. There were six juveniles altogether. Four prisoners had allegedly committed suicide and dozens had tried to kill themselves. The detainees came from forty-three different countries, including from nine Western ones, although only one Western prisoner was still detained. Only fifteen were regarded as “high value,” including ones Bush

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had moved there in late 2006. The government said it suspected that about two dozen others had close ties to al Qaeda, although only accused five of involvement in 9/11. The U.S. had admitted that thirty-eight were not enemy combatants. Warlords and Pakistani police had captured 86 percent of them in exchange for ransom. Twelve had been charged with a crime, and only one was convicted in a process short of a full trial. No one had been allowed to visit family members. Camp Six was now open for business.\(^6^1\) Meanwhile, David Hicks, the one man to date convicted of terrorism at Guantánamo Bay, was released in Australia, having served his prison sentence.\(^6^2\)

Sixty-nine percent of people polled from twenty-six countries said they thought the prison base should be closed down.\(^6^3\) In January 2008, Admiral Mike Mullen, chief of the U.S. military, said he would “like to see [Guantánamo] shut down.” He put it mostly in terms of public relations: “More than anything else it’s been the image – how Gitmo has become around the world, in terms of representing the United States.” In April, Air Force Colonel Morris Davis, the Defense Department’s Former Chief Prosecutor, criticized the process’s reliance on evidence obtained through torture and testified that when he had raised the issue of acquittals with Defense Department general counsel William J. Haynes, who had announced his retirement in February, Haynes replied: “We can’t have acquittals. We’ve been holding these guys for years. How can we explain acquittals? We have to have convictions.” By this time, Defense Secretary Robert Gates and even President Bush now indicated it should be closed down.\(^6^4\) By October 2008, seven Guantánamo prosecutors had resigned, many in disgust with the process being called justice.\(^6^5\)

Although by late 2008 many wanted to see it closed, American detention policy extended beyond Guantánamo. At the Bagram prison facility in Afghanistan, the United States held 630 prisoners by early 2008, three times as many as at Guantánamo. After reports in 2005 of detainee deaths, torture, and disappearances of prisoners, the U.S. government attempted to hand control of the prison over to the Afghan government, without success. In the following years, Bagram became the new Guantánamo, rife with overcrowding and tough living conditions. The U.S. Army admitted homicides of prisoners, and its investigators recommended negligent homicide charges in a case involving twenty-eight soldiers and reservists. One prisoner’s legs were severely traumatized, appearing to have been run over by a bus.\(^6^6\)

\(^6^3\) Joanne Mariner, “A Guantanamo Index.”
Boumediene v. Bush

On June 12, 2008, the United States Supreme Court handed down one of its most controversial decisions in history. In Boumediene v. Bush, the Court affirmed that habeas corpus extended to the U.S. prison camp at Guantánamo Bay, Cuba, and ruled that the 2006 Military Commissions Act unconstitutionally suspended habeas corpus for alien detainees held there. It found the procedures established by Bush and Congress an insufficient substitute for judicial process, but left open the door for the executive and legislative branches to craft a better alternative. Moreover, the decision did not grant any detainees relief, instead forcing them through the hurdles of litigation and ultimately back to the District Court, which could always remand them to custody and uphold their detention.

The petitioners in Boumediene were detained at Guantánamo after having been captured in Afghanistan and elsewhere, and after the CSRT process designated them “enemy combatants.” They denied they were members of al Qaeda or the Taliban. In Rasul v. Bush, the Supreme Court had reversed a DC Circuit Court affirmation of the District Court order that their petitions be dismissed for lack of jurisdiction. District judges gave conflicting responses when the petitioners’ cases came back to them in proceedings.

During the appeals process, the DTA had been passed, stripping Guantánamo detainees of habeas corpus rights. In Hamdan v. Rumsfeld, the Court determined that this act did not apply retroactively to the statutory habeas corpus rights of detainees whose proceedings were under way when the DTA had passed, and found the military commissions as created by the executive alone constitutionally lacking. Therefore, Congress, at Bush’s behest, passed the MCA clarifying the removal of habeas corpus jurisdiction and making it effective as of September 2001.

The DC Circuit Court concluded that section 7 of the MCA had effectively stripped habeas jurisdiction from the courts and that the protections of the Suspension Clause did not apply to aliens at Guantánamo, and that, as a consequence, it did not need to consider whether the process authorized by the DTA was a sufficient substitute for habeas corpus.

The Supreme Court, in its 5–4 decision, arrived at a set of important conclusions: (1) the MCA did indeed apply to such habeas actions as the ones before it, dismissing the petitioners’ textual argument that it did not, meaning that if MCA’s section 7 were constitutional, their cases must be dismissed; (2) the constitutional right of habeas corpus, as protected by the Suspension Clause, did indeed apply to the petitioners – their designation as “enemy combatants” and the location of their detention notwithstanding; (3) the DTA’s procedures were an insufficient substitute for habeas corpus, meaning that the MCA’s stripping of habeas jurisdiction from the federal courts was unconstitutional; (4) there are no prudential reasons to disallow habeas corpus in this case; and (5) the privilege of habeas
The Power of Habeas Corpus in America

corpus is a fundamental freedom important to the fabric of America’s constitutional order.\textsuperscript{67}

This case was especially important as it concerned the constitutional guarantee of habeas corpus, what the extent of that guarantee is, and necessarily turns on how one interprets the common law nature of the Great Writ before American independence. See Appendix H for a full analysis.

Advocates of a hard-line approach to the war on terror saw this decision as a capitulation to civil libertarians and leftist attorneys, who radically wished to bind foreign military detention policy with civil law.\textsuperscript{68} Since shortly after 9/11, they defended President Bush’s “enemy combatant” policy, subjecting terrorist suspects and war captives to executive prerogative with virtually no oversight from the other two branches of government. And after getting Congress involved with its Military Commission Act of 2006, the administration continued to behave as though its actions were beyond judicial scrutiny. \textit{Boumediene} was a blow against this doctrine.

The day after the decision, John McCain, an indefatigable champion of Bush’s war on terror but a moderately vocal critic of torture,\textsuperscript{69} called \textit{Boumediene} “one of the worst decisions in the history of the country,” to which celebrated conservative pundit George Will, who found McCain’s comments at least hyperbolic and perhaps offensive, critically replied,

Does it rank with \textit{Dred Scott v. Sanford} (1857), which concocted a constitutional right, unmentioned in the document, to own slaves and held that black people have no rights that white people are bound to respect? With \textit{Plessy v. Ferguson} (1896), which affirmed the constitutionality of legally enforced racial segregation? With \textit{Korematsu v. United States} (1944), which affirmed the wartime right to sweep American citizens of Japanese ancestry into concentration camps?\textsuperscript{70}

Although many conservatives tended to see it McCain’s way, some on the right hailed the decision. A former associate deputy attorney general under President Ronald Reagan, constitutional law expert Bruce Fein, applauded the Court, saying that Bush’s anti-terror “excesses are alarmingly reminiscent of Joseph Stalin and Mao Tse-tung.”\textsuperscript{71}

Right after the decision, civil liberties groups voiced their approval. Elisa Massimino from Human Rights First proclaimed,

\begin{itemize}
\item \textsuperscript{67} 553 U.S. 723 (2008).
\item \textsuperscript{68} For a scholarly argument to this effect, see Mark D. Hill, “\textit{Boumediene v. Bush}: The Supreme Court’s War on Precedent Damages the War on Terror,” \textit{Creighton Law Review}, Vol. 447 (April 2009).
\end{itemize}
This is not only a victory for the rule of law, but will strengthen U.S. counterterrorism policy. Prolonged detention without charge and trials that violate our values as a Nation fuel terrorist propaganda and hamper efforts to nurture democracy and the rule of law around the world, which are so critical to confronting the threat of terrorism.\footnote{Tony Mauro, “Roundup of Reaction to Boumediene,” \textit{The Blog of Legal Times}, June 12, 2008. Available at http://legaltimes.typepad.com/blt/2008/06/roundup-of-reac.html.}

Such triumphant opining dominated among critics of Bush terror policy. But Larry Cox from Amnesty International was more cautious in his optimism:

The U.S. Supreme Court decision is a limited victory for human rights. It will not stop U.S. officials from transferring detainees to places where their constitutional right to habeas corpus is not protected. It will not close Guantánamo. And it will likely not stop the Bush administration from finding devious ways to circumvent the law.\footnote{Mauro, “Roundup of Reaction to Boumediene.”}

Ironically enough, such an assessment is not so different from Chief Justice John Roberts’s appraisal of the decision’s meaning found in his dissent:

So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D. C. Circuit – where they could have started had they invoked the [Detainee Treatment Act] procedure.\footnote{\textit{Boumediene v. Bush}, 553 U.S. 723, 801 (2008) (Roberts dissenting).}

Roberts’s dissent indeed argued that the process just struck down was

the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law’s operation.\footnote{\textit{Boumediene v. Bush}, 553 U.S. 723, 826 (2008) (Roberts dissenting).}

In short, the Chief Justice’s main dissent was that the decision changed very little, including for the detainees themselves. Even from the standpoint of critics of Guantánamo policy, it was a “limited victory,” just as Larry Cox from Amnesty said.

Justice Antonin Scalia’s dissent, however, stood at logical odds with his colleague’s dissent. “Today, for the first time in our Nation’s history,” Scalia wrote, “the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.”\footnote{\textit{Boumediene v. Bush}, 553 U.S. 723, 826 (2008) (Scalia dissenting).} He predicted that in the short
term, “the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield.” This claim, like many others, has been refuted by the Seton law studies.77

Scalia warned of the “disastrous consequences” to expect, and, although he criticized the majority for mixing up law with foreign policy, he ominously predicted that in this “war with radical Islamists” the decision “will almost certainly cause more Americans to be killed.” “Most tragically,” Scalia concluded, the decision “sets our military commanders the impossible task of proving to a civilian court... that evidence supports the confinement of each and every enemy prisoner.”78

So which was it? Was this a limited victory for civil libertarians, and a limited but obnoxious setback for the establishment, as Roberts implied? Or was it fundamental? From Scalia’s words, and from some of those celebrating Boumediene, we could gather that the Court had effected a radical change in habeas corpus policy for American society. But the chief justice, and less optimistic Bush critics, saw the decision as far less than revolutionary.

At heart are two controversies, two questions that cut to the core of habeas corpus, the Anglo-American legal system, the war on terror, and the very nature of the power of the state to detain people. The first speaks to habeas’s reach – a question on which Scalia and Roberts could be seen on one side and the civil libertarians on the other. The other question, less commented upon, concerns the substantive meaning of habeas corpus, of due process in general, and whether having this classic legal remedy affirmed necessarily translates into a meaningful check on government power and justice for the detained. On this question, Scalia’s and Roberts’s dissents stood in tension with one another.

Democrats in the 2008 presidential election criticized Bush’s broad executive detention powers, and Republicans boasted their toughness on this and other terrorism-related issues. In a May 2007 primary debate, Republican candidate Mitt Romney opined, “Some people have said we ought to close Guantánamo. My view is we ought to double Guantánamo.”79 Sixteen months later, Vice Presidential candidate Sarah Palin said to a wildly cheering crowd at the Republican National convention in St. Paul, Minnesota, “Al-Qaida terrorists still plot to inflict catastrophic harm on America. [Democratic candidate Barack Obama is] worried that someone won’t read them their rights?”80

80 Ironically, her next line was, “Government is too big... he wants to grow it” – as though the power to detain suspects without due process has little to do with “big government.” “Transcript: Gov. Sarah Palin at the RNC,” NPR.org, September 3, 2008. Available at http://www.npr.org/templates/story/story.php?storyId=94258995.
In November 2008, the American people elected a new president who pledged repeatedly to shut down Guantánamo and restore habeas corpus. Even though a president could technically fulfill such promises without bringing true justice to the detained, they still qualified as significant campaign vows that went to the heart of the Bush administration’s treatment of detainees. On January 20, 2009, Barack Obama took office as the new president of the United States, thus changing his role from legislator and critic of executive detention to the custodian in charge of the U.S. detention state.

The aftermath of Boumediene exposed the limits of habeas corpus. Bush’s shell game – finding ways to circumvent the spirit of habeas while seemingly obeying the letter of the Courts’ demands – continued. Indeed, the game did not end with Bush. President Barack Obama, who campaigned in 2008 on the slogan of “hope” and “change” – including as it concerned Bush’s anti-terror policies – soon took actions that gutted Boumediene’s impact, both in its narrow victory for Guantánamo prisoners and its broader meaning for detention policy. Soon Obama became the latest of history’s habeas champions who, once political expediency demanded it, became ardent defenders of a nearly unlimited prerogative detention power.
I can . . . imagine the terror I would feel if one of my family members were rounded up in the middle of the night and sent to Guantánamo without even getting one chance to ask why they were being held and being able to prove their innocence.

– Barack Obama

President Obama’s detention policies quickly revealed themselves as contrary to the lofty principles he espoused as a 2008 presidential candidate, marking yet one more example of habeas hypocrisy. Military commissions, Guantánamo, indefinite detention, renditioning, and most other extreme manifestations of Bush’s detention policy continued and in some cases expanded. Moreover, thanks partly to a deferential federal judiciary, the Supreme Court’s Boumediene decision failed to liberate as many Guantánamo prisoners as many hoped, and Obama’s extreme detention policy at Bagram and his assassination of an American citizen only underscored habeas’s sharp limitations in restraining executive power. With the Obama presidency, undertaken amidst considerable expectations of significant change to detention policy and greater respect for habeas corpus, the writ’s tendency to lean toward the interests of power once again became clear.

Of all the issues on which Barack Obama distanced himself from his opponent John McCain in the 2008 election, none excited civil libertarians more than his radically different position on habeas corpus. But soon after taking power, Obama became the latest in a long line of situational habeas champions. Aside from some changes that might have happened anyway, and some symbolic gestures in Obama’s first week of office — ordering Guantánamo shut within a year, putting a moratorium on military commissions — Obama’s legacy from 2009 through 2012 was to ratify and even amplify Bush’s claims of executive power.

CANDIDATE OBAMA, CONCERNED CIVIL LIBERTARIAN

In September 2006, when Congress passed the Military Commissions Act (MCA), legalizing the extrajudicial tribunal system set up by the Bush administration, both Obama and McCain were in the Senate. McCain voted in favor and Obama voted against. On September 27, 2006, as Congress considered an amendment to the MCA to restore the right of detainees to federal habeas corpus, Obama gave a stirring speech on the Senate floor. It was a fairly concise argument against the Bush administration’s abuse of habeas corpus rights for prisoners at Guantánamo. It echoed a range of arguments and insights made by the most trenchant critics of the Bush policy. It eloquently summarized so many of the relevant arguments and stands in great contrast with what Obama later did as president.

On the question of the inadequacy of the Detainee Treatment Act and Combatant Status Review Tribunals (CSRTs), Obama said,

[U]nder the existing rules of the Detainee Treatment Act, court review of anyone’s detention is severely restricted. Fortunately, the Supreme Court in Hamdan ensured that some meaningful review would take place. But in the absence of Senator Specter’s amendment that is currently pending, we will essentially be going back to the same situation as if the Supreme Court had never ruled in Hamdan, a situation in which detainees effectively have no access to anything other than the Combatant Status Review Tribunal, or the CSRT.

.... I have actually read a few of the transcripts of proceedings under the CSRT. And I can tell you that oftentimes they provide detainees no meaningful recourse if the Government has the wrong guy.

In particular, Obama compellingly argued that the CSRT transcripts revealed a very flawed process where evidence mattered less than repeated accusations. He continued:

Now, the vast majority of the folks in Guantánamo, I suspect, are there for a reason. There are a lot of dangerous people. Particularly dangerous are people like Khalid

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4 Obama elaborated: “Essentially, reading these transcripts, they proceed as follows: The Government says: You are a member of the Taliban. And the detainee will say: No, I’m not. And then the Government will not ask for proof from the detainee that he is not. There is no evidence that the detainee can offer to rebut the Government’s charge. The Government then moves on and says: And on such and such a date, you perpetrated such and such terrorist crime. And the detainee says: No, I didn’t. You have the wrong guy. But again, he has no capacity to place into evidence anything that would rebut the Government’s charge. And there is no effort to find out whether or not what he is saying is true. And it proceeds like that until effectively the Government says, OK, that is the end of the tribunal, and he goes back to detention. Even if there is evidence that he was not involved in any terrorist activity, he may not have any mechanism to introduce that evidence into the hearing” (Ibid.).
Shaikh Mohammed. Ironically, those are the guys who are going to get real military procedures because they are going to be charged by the Government. But detainees who have not committed war crimes – or where the Government’s case is not strong – may not have any recourse whatsoever.

. . . . Current procedures under the CSRT are such that a perfectly innocent individual could be held and could not rebut the Government’s case and has no way of proving his innocence.

Obama went on to explain why this issue should concern all everyday Americans:

I do not want to hear that this is a new world and we face a new kind of enemy. I know that. I know that every time I think about my two little girls and worry for their safety – when I wonder if I really can tuck them in at night and know that they are safe from harm. . . .

But as a parent, I can also imagine the terror I would feel if one of my family members were rounded up in the middle of the night and sent to Guantanamo without even getting one chance to ask why they were being held and being able to prove their innocence.

In anticipation of the claim that the prison camp held few innocent people, that they were the “worst of the worst,” Obama boldly stated:

We have already had reports by the CIA and various generals over the last few years saying that many of the detainees at Guantanamo should not have been there. As one U.S. commander of Guantanamo told the Wall Street Journal:

“Sometimes, we just didn’t get the right folks.”

We all know about the recent case of the Canadian man who was suspected of terrorist connections, detained in New York, sent to Syria – through a rendition agreement – tortured, only to find out later it was all a case of mistaken identity and poor information.

Obama conceded that “[t]his is an extraordinarily difficult war we are prosecuting against terrorists. There are going to be situations in which we cast too wide a net and capture the wrong person.” However, “what is avoidable is refusing to ever allow our legal system to correct these mistakes. By giving suspects a chance – even one chance – to challenge the terms of their detention in court, to have a judge confirm that the Government has detained the right person for the right suspicions, we could solve this problem without harming our efforts in the war on terror one bit.”

Obama stressed the “irony” that a true terrorist mastermind like Khalid Shaikh Mohammed would get more procedural safeguards than a most likely innocent detainee. Civil libertarians had made this critique before. In an attempt to sound

5 Obama says: “… Khalid Shaikh Mohammed is going to get basically a full military trial, with all of the bells and whistles. He will have counsel, he will be able to present evidence, and he will be able to
at least somewhat tough on terrorists, Obama clarified that he had no interest in “frivolous lawsuits” over “whether [a prisoner’s] cell is too small or whether the food they get is sufficiently edible or to their tastes.” Moreover, and indeed quite ominously, Obama stressed that he actually agreed with senators concerned “that if habeas is allowed, it renders the CSRT process irrelevant because the courts will embark on de novo review.” He suggested that instead the government should “set up a system in which a military tribunal is sufficient to make a determination as to whether someone is an enemy combatant and would not require the sort of traditional habeas corpus that is called for as a consequence of this amendment, where the court’s role is simply to see whether proper procedures were met.” With this concession, he gave himself a deal of flexibility with which to equivocate in the future. However, he concluded with words clearly in favor of much stronger guarantees for the detainees than they had enjoyed under Bush:

To deny habeas corpus to our detainees can be seen as a prescription for how the captured members of our own military, diplomatic, and NGO personnel stationed abroad may be treated. . . . The Congress has every duty to insure their protection, and to avoid anything which will be taken as a justification, even by the most disturbed minds, that arbitrary arrest is the acceptable norm of the day in the relations between nations, and that judicial inquiry is an antiquated, trivial and dispensable luxury.

The world is watching what we do today in America. They will know what we do here today, and they will treat all of us accordingly in the future – our soldiers, our diplomats, our journalists, anybody who travels beyond these borders. I hope we remember this as we go forward. I sincerely hope we can protect what has been called the “great writ” – a writ that has been in place in the Anglo-American legal system for over 700 years.

Mr. President, this should not be a difficult vote. I hope we pass this amendment because I think it is the only way to make sure this underlying bill preserves all the great traditions of our legal system and our way of life.

“The Great Writ.” Part of the “Anglo-American legal system for over 700 years.” “The great traditions of our legal system and our way of life.” These are fairly strong words in favor of habeas corpus rights for those detained in the war on terror.

On top of an advocacy for habeas corpus rights that set him apart from the Republican candidates, candidate Obama also made a key part of his platform the closing of the Guantánamo Bay prison camp. At the “Take Back America” conference in
Washington, DC, on June 17, 2007, Obama, running in the Democratic primaries, said,

It’s time for us to close Guantánamo and restore the right of habeas corpus. It’s time to show the world that we are not a country that ships prisoners in the dead of night to be tortured in far off countries. That we are not a country that runs prisons which lock people away without ever telling them why they are there or what they are charged with.\(^6\)

On June 12, 2008, when the Supreme Court handed down its decision in *Boumediene v. Bush*, rebuking the Bush administration’s theory that habeas corpus did not reach Guantánamo and striking down key parts of the Military Commissions Act Obama had voted against, the candidate, now having the necessary delegates to win the Democratic nomination, released this statement on his campaign Web site:

Today’s Supreme Court decision ensures that we can protect our nation and bring terrorists to justice, while also protecting our core values. The Court’s decision is a rejection of the Bush Administration’s attempt to create a legal black hole at Guantánamo – yet another failed policy supported by John McCain. This is an important step toward reestablishing our credibility as a nation committed to the rule of law, and rejecting a false choice between fighting terrorism and respecting habeas corpus. Our courts have employed habeas corpus with rigor and fairness for more than two centuries, and we must continue to do so as we defend the freedom that violent extremists seek to destroy. We cannot afford to lose any more valuable time in the fight against terrorism to a dangerously flawed legal approach. I voted against the Military Commissions Act because its sloppiness would inevitably lead to the Court, once again, rejecting the Administration’s extreme legal position. The fact is, this Administration’s position is not tough on terrorism, and it undermines the very values that we are fighting to defend. Bringing these detainees to justice is too important for us to rely on a flawed system that has failed to convict anyone of a terrorist act since the 9–11 attacks, and compromised our core values.\(^7\)

This concept that the commissions constituted a “legal black hole” by which the administration could avoid either the safeguards of military law or those of civil law so as to treat “enemy combatants” without traditional due process had become a common theme in critiques of Bush detention policy, and it became adopted by Obama as a campaign talking point in his quest for the presidency. In August 2008, three months before the presidential election, Salim Hamdan became the first person convicted under the commissions established by the Military Commissions Act. Obama responded by reiterating his position that all suspects should face trial


in a normal court proceeding or enjoy all the rights traditionally provided under military law:

That the Hamdan trial – the first military commission trial with a guilty verdict since 9/11 – took several years of legal challenges to secure a conviction for material support for terrorism underscores the dangerous flaws in the Administration’s legal framework. It’s time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice.  

After the election, Obama indicated that he would keep Bush’s Defense Secretary Robert Gates on board in charge of the Pentagon. Along with many other leaders in the Bush administration, Gates had already expressed that he would like to see Guantánamo closed. He made this opinion known as early as March 2007. This was, in fact, an official goal of the Bush administration already, but by running for president on it and coupling the promise with a general and very often declared respect for the principles of habeas corpus, the Obama campaign gave the impression that it would make closing the prison camp a key focus. In an interview with Charlie Rose in December 2008, roughly one month before Obama’s inauguration, Gates said, “I would like to see it closed. And I think it will be a high priority for the new administration.”

PRESIDENT OBAMA, CUSTODIAN

On the evening of his inauguration, January 20, 2009, President Obama ordered a suspension of military commissions at Guantánamo and filed a request to Washington, DC’s District Court requesting a stay on the Guantánamo habeas corpus proceedings. Two days later, he signed executive orders banning CIA secret prisons, ordering the CIA to conform to the Army Field Manual in its interrogation procedures, and setting a schedule to close the Guantánamo Bay prison within one year. The rebuke of torture and black sites was at minimum an important symbolic repudiation of Bush era policies, although the particular torture methods and secret prisons targeted had for the most part already ended during the Bush administration.

These executive orders encouraged many habeas enthusiasts, but soon afterward, Obama’s detention policies came to resemble those of his predecessor in nearly every respect. His first major test concerned a case of four men suing for habeas corpus from Bagram. In response to the Boumediene decision, the Bush administration did what officials have done since medieval England to avoid judicial due process: the executive began sending prisoners far outside the reach of legal protection. This

purpose undergirded the creation of Guantánamo, and the Bagram Air Force Base in Afghanistan became the new “legal black hole.” As Glenn Greenwald averred,

So, instead of bringing them to our Guantánamo prison camp (where, the U.S. Supreme Court ruled, they were entitled to habeas hearings), the Bush administration would instead simply send them to our prison camp in Bagram, Afghanistan, and then argue that because they were flown to Bagram rather than Guantánamo, they had no rights of any kind and Boumediene didn’t apply to them. The Bush DOJ treated the Boumediene ruling, grounded in our most basic constitutional guarantees, as though it was some sort of a silly game – fly your abducted prisoners to Guantánamo and they have constitutional rights, but fly them instead to Bagram and you can disappear them forever with no judicial process. Put another way, you just close Guantánamo, move it to Afghanistan, and – presto – all constitutional obligations disappear.\(^\text{11}\)

Three months after the Boumediene decision, four detainees who claimed they were captured outside of Afghanistan and brought to Bagram, including a Yemeni citizen, an Afghan captured in the United Emirates, a Yemeni captured in Thailand, and a Tunisian captured in Pakistan, filed suit in Washington, DC’s District Court. They argued that Boumediene invalidated Section 7 of the Military Commissions Act, thus restoring District Court jurisdiction over their detention. The Bush administration predictably claimed they were enemy combatants with no right to habeas corpus. District Judge John Bates, a George W. Bush appointee, conservative justice, and executive supremacist in other areas, decided the case in April 2009, after Obama took office. Bates ruled against the man who appointed him:

The issues here closely parallel those in Boumediene, in large part because the detainees themselves as well as the rationale for detention are essentially the same. . . .

Bates reflected “that the writ of habeas corpus plays a central role in our constitutional system as conceived by the Framers” and made a bold determination:

Based on those conclusions driven by application of the Boumediene test, the Court concludes that the Suspension clause extends to, and hence habeas corpus review is available to, three of the four prisoners [the Afghan citizen among them not having the same rights].

The specific constitutional question posed by these four cases is whether petitioners – foreign nationals designated as enemy combatants, captured and held abroad at Bagram – are entitled to invoke the protections of the writ of habeas corpus in U.S. courts. This is essentially the same “specific question” the Supreme Court faced in Boumediene. . . .

Bates compellingly reasoned that the U.S. courts properly maintained jurisdiction over the island given the “objective degree of control” of the United States over Guantánamo. While not ruling in favor of the Afghan claiming he was captured outside of Afghanistan, Gates did rule on behalf of the other three petitioners, with the radical implication that the principles of Boumediene did in fact extend to other prison camps outside of U.S. soil where the United States maintained a very high “objective degree of control.”

In response to this staggering rebuke of the old Bush administration detention policy, the Obama Department of Justice announced it would appeal the decision and asked Judge Bates not to proceed on the habeas corpus cases of the three detainees. Therefore, Obama sided with his predecessor, revealing the government’s intention to continue circumventing the law by sending detainees beyond the reach of the courts. The Obama administration gave every indication it would continue the Bush practice of shipping prisoners to faraway lands simply to create a “legal black hole.”

WAVERING ON GUANTÁNAMO, MILITARY COMMISSIONS, AND INDEFINITE DETENTION

Obama soon reversed himself on Guantánamo. He promised upon taking office that the prison camp would be shut down within one year – by late January 2010. In May 2009, congressional Democrats withdrew funding for the closing of the

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12 Gates writes: “The touchstone of the site of detention factor is the ‘objective degree of control’ the United States has over Bagram….

“The U.S. presence in Afghanistan is governed by both a lease and a Status of Forces Agreement (‘SOFA’). Read together, the United States appears to have near-total operational control at Bagram….

“Applying the Boumediene factors carefully, the Court concludes that these petitioners are virtually identical to the detainees in Boumediene – they are non-citizens who were (as alleged here) apprehended in foreign lands far from the United States and brought to yet another country for detention. And as in Boumediene, these petitioners have been determined to be ‘enemy combatants,’ a status they contest. Moreover, the process used to make that determination is inadequate and, indeed, significantly less than the Guantánamo detainees in Boumediene received. Although the site of detention at Bagram is not identical to that at Guantánamo Bay, the ‘objective degree of control’ asserted by the United States there is not appreciably different than at Guantánamo. Finally, it cannot be denied that the ‘practical obstacles’ inherent in resolving a Bagram detainee’s entitlement to habeas corpus are in some ways greater than those present for a Guantánamo detainee, because Bagram is located in an active theater of war.

“It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which respondents correctly maintain is in a theater of war. It is quite another thing to apprehend people in foreign countries – far from any Afghan battlefield – and then bring them to a theater of war, where the Constitution arguably may not reach. Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in Boumediene – the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely” (District Judge John Gates, Memorandum Opinion, Fadi al Maqaleh, et al. v. Robert Gates, Haji Wazir v. Gates, Amin Al Bakri v. Obama, Redha al-Najar v. Gates. April 2, 2009).

13 Ibid.

prison facility, asking for more details about the administration’s intentions.\textsuperscript{15} By January 2010, after Obama’s promised one-year timetable lapsed, his special envoy in charge of the operation said he was “confident” that it would be closed within another three years, by the end of Obama’s first term.\textsuperscript{16} According to Columbia Law School Associate Professor Matthew Waxman, in March 2011, Obama issued orders establishing indefinite detention at the prison camp, indicating that “Guantanamo will be open for a long time.”\textsuperscript{17} Meanwhile, although Obama vowed to end torture, Guantánamo abuses only worsened after he took office, according to one attorney who cited “beatings, the dislocation of limbs, spraying of pepper spray into closed cells, applying pepper spray to toilet paper and over-forcefeeding detainees who are on hunger strike.”\textsuperscript{18}

In what seemed a divergence from Bush policy, the Obama administration decided to use civil court to try Ali Saleh Kahlah al-Marri, the one “enemy combatant” still held from the Bush years within the continental United States. As Bruce Fein wrote in the \textit{Washington Times},

\begin{quote}
Mr. al-Massri’s “enemy combatant” status rested on a sworn statement that he had personally met Osama bin Laden and Khalid Sheik Mohammed and that he was in contact with Mustafa Ahmed al-Hawasi, an alleged travel facilitator for al Qaeda, who financed his $10,000 trip to Illinois. Every one of these high-octave allegations disappeared in the criminal complaint, which suggests they were concocted or extracted by torture.\textsuperscript{19}
\end{quote}

In July 2008, the Fourth Circuit Court determined that al-Marri could be held as an enemy combatant, but also that he had a right to challenge his detention. On February 26, 2009, the Obama administration indicted him and on April 30, al-Marri pled guilty to training in al Qaeda camps and arriving in the United States with plans to assist that group the day before 9/11.\textsuperscript{20} However, even this move to halt the indefinite detention of al-Marri had its similarities with Bush policy. As Fein wrote:

\begin{quote}
The Obama administration’s shifting tactics unfolded as the Supreme Court was poised to hold unconstitutional the claim of inherent presidential authority to detain U.S. citizens or permanent residents as “enemy combatants” under the laws of war in a post-Sept. 11, 2001, environment. The high court has rejected virtually every
\end{quote}


\textsuperscript{17} “Obama’s Guantánamo Shift,” \textit{CFR.org}, March 10, 2011.


extraordinary “war” power asserted by the president to defeat international terrorism, including military commissions, the suspension of habeas corpus, the placement of Guantanamo Bay in a legal twilight zone, and detentions based on the president’s say-so alone. President Obama is hoping to avoid the court’s anticipated curtailment of the president’s power to detain for life without accusation or by arguing Mr. al-Masri’s challenge is now moot since he has now been charged with crime, and will enjoy an opportunity to defend.

The Bush administration succeeded in a comparable dodge against Padilla, a United States citizen. He was initially detained as an “enemy combatant” based on an allegation of conspiracy to detonate a “dirty radiation bomb” on American soil. Padilla disputed the allegation. President Bush then dropped the “enemy combatant” detention in favor of a criminal prosecution for conspiring to train in a terrorist training camp and actual training. Padilla was convicted and sentenced in the ordinary criminal justice system.21

On May 2, 2009, the New York Times reported that the administration was considering reviving the military commissions Obama had suspended the week of his inauguration, but in a slightly altered form. The commissions, a major target of Obama’s criticism on the campaign trail, were now back on the table. “The more they look at it,” said an official according to the Times, “the more commissions don’t look as bad as they did on Jan. 20.”22

This drew criticism from proponents of civil law. Denny LeBoeuf, a lawyer who saw the commissions firsthand, wrote on Salon.com that “any purportedly retooled military commissions will be the same discredited proceedings that I observed before President Obama issued his promising orders to halt the injustice. . . . [T]he military commissions, no matter how meticulously enhanced, can never serve as an acceptable alternative to a true court of law.” In defending the civil court system’s adequacy, LeBoeuf noted that

existing federal laws provide all the protection that lawful intelligence-gathering requires. The federal trials of the Blind Sheikh, the 1993 World Trade Center bombing, the 1998 East African Embassy bombings and the capital trial of Zacharias Moussaoui demonstrate that. Indeed, two former prosecutors studied every single terrorism-related trial ever conducted in the U.S. and concluded that the federal courts are eminently capable of handling these cases.

She listed some of the crucial motions conventionally allowed in capital cases neglected in the commissions:

- Motion to give the defendants – held without counsel for over five years – time to meet with their lawyers before the hearings began? Denied.

21 Fein, “Criminals Not Warriors.”
The Power of Habeas Corpus in America

• Motion for confidential services of experts, a commonplace request in capital cases? Denied.
• Motion for a capital case investigator, routinely afforded any capital defendant in civilian courts? Denied. (We pointed out that the last military death penalty was reversed on appeal for failure to appoint such an investigator. Didn’t matter.)
• Motion for a secure phone line so the Guantánamo defendants could speak with their lawyers at a classified facility in the states? Denied.
• Motion for accurate simultaneous translations in court? Denied.
• Oral motion for a legal pad by a defendant who is representing himself, so he can prepare written motions? Denied because “you have to make that motion in writing.” (Author emphasis added.)

The injustice in the commissions, LeBoeuf argued, was clear in its institutional history:

Gen. Thomas Hartmann, the supposedly neutral legal advisor to the Convening Authority, famously remarked that in the military commissions there must be no acquittals. He dismissed a chief prosecutor whose sin was that he felt that the proceedings should be fundamentally fair. Three military commission prosecutions eventually had to be recommenced after Hartmann was found to have illegally pressured the prosecutors. Eventually, six line prosecutors resigned, five explicitly citing violations of their professional ethics if they continued to serve as prosecutors in the military commissions. Thus far, more prosecutors resigned than ever examined a witness in the bogus commission courts.23

On May 16, David Sanger wrote in the New York Times:

President Obama’s decisions this week to retain important elements of the Bush-era system for trying terrorism suspects and to block the release of pictures showing abuse of American-held prisoners abroad are the most graphic examples yet of how he has backtracked, in substantial if often nuanced ways, from the approach to national security that he preached as a candidate, and even from his first days in the Oval Office.24

On May 21, Obama gave a major speech on civil liberties and the rule of law. He spoke in front of the National Archives, standing just feet from the Constitution and Bill of Rights. He criticized the Bush administration’s “hasty decisions” and stressed that “[f]idelity to our values is the reason why the United States of America grew from a small string of colonies under the writ of an empire to the strongest nation in the world.” He took credit for working on closing Guantánamo and putting “enemy combatant” al-Marri before a civil judicial process. He said that any moves taken in the war on terror must be done “with an abiding confidence in the rule of law and due process; in checks and balances and accountability.”

Yet in the same speech, Obama described policies that differed very little from those of his predecessor. He outlined four classes of detainees: those who would face federal court, those whom the judicial system would release, as well as two other classes. First, he explained the necessity for military commissions:

... detainees who violate the laws of war and are best tried through Military Commissions. Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot be effectively presented in federal Courts.

Even more disturbing for those who hoped Obama would stick to his promises, the president described the fourth group of detainees:

Finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people.

I want to be honest: this is the toughest issue we will face. We are going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States. Examples of that threat include people who have received extensive explosives training at al Qaeda training camps, commanded Taliban troops in battle, expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States.

As I said, I am not going to release individuals who endanger the American people. Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture – like other prisoners of war – must be prevented from attacking us again. However, we must recognize that these detention policies cannot be unbounded.\(^{25}\)

Obama then unveiled a policy of “prolonged detention” for those whom even a military commission could not sufficiently address. He claimed these detentions would be governed by “fair procedures so that we don’t make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.” The inclusion of Taliban commanders in particular troubled those who regarded soldiers not as terrorists but as prisoners of war.

In a June 14 interview with The Economist, Glenn Greenwald intoned,
The other most serious transgression [along with Obama’s support of Bush state secrets doctrines] is his embrace of the core Bush/Cheney idea that detainees in the name of terrorism can be abducted and then imprisoned indefinitely without charges of any kind. From his attempt to block detainees at Bagram from having any rights at all to his proposal for indefinite detention, Mr Obama is on the verge of institutionalising what had been merely an ad hoc policy of Bush/Cheney: the right of the president to imprison people forever, with no charges.\(^{26}\)

According to a June 18 New York Times/CBS poll, a policy of “indefinite detention” was, at the time, opposed by 68 percent of the population, who believed the detainees should be “charged or released.”\(^{27}\) The vast majority of the population disagreed with Obama’s policy, showing it was not a simple reflection of political pressure.

On June 26, 2009, it was reported that Obama had “drafted an executive order that would reassert presidential authority to incarcerate terrorism suspects indefinitely.” This order, just in the short term, could affect as many as ninety Guantánamo inmates the Justice Department had three months before deemed ineligible for either prosecution or release. That same week, Obama signed an appropriations bill that committed him to notifying Congress any time he intended to move any prisoners out of Guantánamo and prohibited the use of funds to bring any detainees into the United States. Russ Feingold, a Democratic senator who had stood almost alone in his legislative body against the Anti-Terrorism and Effective Death Penalty Act and stood completely alone in voting against the Patriot Act, said “I think this [policy of prolonged detention] could be a very big mistake, because of how such a system could be perceived throughout the world.”\(^{28}\)

On July 1, 2009, in a Washington Post commentary, “No Justice Today at Guantánamo,” attorney Barry Wingard summed up the expectations and disappointment:

Like his fellow prisoners at Guantánamo Bay, Kuwaiti detainee Fayiz Mohammed Ahmed al-Kandari hoped that President Obama’s election would finally bring justice. Judges, not political appointees, would prevail and restore the rule of law. Fayiz, who has been my client for about 10 months, has been confined at Guantánamo for more than seven years. He has been subjected to harsh treatment and “enhanced interrogation techniques,” resulting in physical and psychological pain.

Wingard explained that the “Immediate Reaction Force” – whom the cell-block guards call for assistance – has increased its number of bruising “cell extractions.” This notorious process stood at the core of the critiques of the Bush administration’s

\(^{26}\) “Seven Questions for Glenn Greenwald,” Economist.com, June 14, 2009.


Guantánamo policy, as well as the manner in which it treated detainees, a manner often called “torture.”

WORSE THAN GUANTÁNAMO

Even more disturbing than the Guantánamo situation became the prison system at Bagram Air Force Base. The Guantánamo prisoners at least had CSRTs, and Bush had released the overwhelming majority of them. Bagram had no such safeguards. Many of the original Guantánamo detainees rounded up in the Afghanistan/Pakistan area were temporarily detained at Bagram, demonstrating the material similarity between the plight of prisoners in one facility and the other.

After the Boumediene ruling, the Bush administration stopped bringing detainees from Bagram to Guantánamo, and the former, originally a temporary detention facility, morphed into a permanent one. Early on, Bagram contained about half as many prisoners as Guantánamo. By January 2008, there were 630 prisoners at Bagram, more than double the 275 at Guantánamo.29

As a consequence of Obama’s escalation of war in Afghanistan, the Parwan Detention Facility at Bagram began to swell. Obama always vowed, however ambiguously, to tame down the war in Iraq while consistently advocating an expansion of the war in Afghanistan.30 In February 2009, he made good on his promise, announcing the deployment of 17,000 more troops.31 By late 2009, Obama announced another 30,000 troops were needed to pacify the country, assist in the widened war over neighboring Pakistan, squash the drug trade, and prevent new terrorist safe havens.32 Such an expanded war created more prisoners – even far more than Bush ever detained and put in Guantánamo. In February 2009, the newly inaugurated president designated another $60 million to expand the Bagram prison facility so as to allow it to hold five times as many detainees as remained in Guantánamo.33

The overwhelming majority of Bagram detainees were Afghans, but a few dozen were Pakistanis caught in the wrong place at the wrong time. Fifty or so were non-Afghans whose origins the United States was loath to disclose.34 Some were detained there for a decade. In August 2009, General David Petraeus, the top U.S. commander in Afghanistan, recommended the release of about 400 prisoners – the

majority of the prison population at the time. As of November 2011, they remained detained.\footnote{Razeshta Sethna, “Pakistani Prisoners at Bagram Wait for Justice,” Dawn.com, December 2, 2011.}

A *Times of London* editorial in May 2009 complained about “the grossly under-reported story [of] a U.S.-run jail that Mr. Obama does not want the world to focus on. . . . It is Bagram, not Guantanamo, that should trouble the world’s conscience.” Tim Reid of the *Times* noted that there were “more than 600 prisoners, many held for years, and all without charges and indefinitely are packed into conditions far worse than Guantanamo.” Tina Foster, executive director of the International Justice Network, observed that Obama “has adopted the Bush administration policy which allows the president to maintain a completely lawless enclave any place in the world besides the U.S. and Guantanamo Bay. They’d like the American public to believe they have solved the problem by declaring they are going to close Guantanamo.”\footnote{Tom Curry, “Bagram: Is it Obama’s New Guantanamo?” MSNBC.com, June 3, 2009.}

In January 2010, it was announced that the Afghan government would take over the prison by the end of the year.\footnote{Peter Graff, “Afghans Agree to Take Over U.S. Prison at Bagram,” Reuters, January 9, 2010.} But U.S. officials soon expressed concern that the Afghan legal system would release prisoners under their control. Afghan President Hamid Karzai expressed reservations about indefinite detention, although some Afghan officials favored this option. Under Afghan law, many detainees might be freed whom the United States did not want to see released as the Afghanistan war raged. In contrast, the Baghdad government had released many prisoners in Iraq who could not be tried, without much protest from the U.S. government.\footnote{Rajiv Chandrasekaran, “Afghan Officials Want to Prolong Detentions,” Washington Post, January 26, 2011.}

In November 2011, there were more than 3,000 detainees in Bagram—five times the number as when Obama took office and eighteen times as many as the 170 at Guantánamo Bay.\footnote{Seth Doane and Phil Hirschkorn, “Bagram: The Other Guantánamo?” CBSNews.com, November 13, 2011.} The military meanwhile developed plans to expand the prison’s capacity to 5,500.\footnote{Bob Orr and Phil Hirschkorn, “The Debate Over Captured Terrorism Suspects,” CBSNews.com, December 4, 2011.}

In March 2012, the United States and the Karzai government agreed that the prison would be handed over to Afghan authorities over a six-month transition period. U.S. officials complained that this transition was too short and indicated that the United States would maintain some authority over the prison for years to come. During the interim period, General Ghulam Farouq began to inherit nominal control over the facility, although the United States continued to regulate his activity, approving his visitors and forbidding him to bring his cell phone to the prison. Most important, the United States maintained through its agreement with the Afghan government veto power over all detainee releases, over the protests of experts in international and
Afghan law. American officials said this crucial veto authority would persist so long as American forces occupy Afghanistan, which could surpass the 2014 withdrawal benchmark by a decade, given President Obama’s quiet agreement to keep some U.S. forces in Afghanistan through 2024. As of June 2012, 1,300 of the 3,000 detainees had been moved to Afghan’s nominal control and 154 had been released for time served.41 In the following months, the Afghan government took custody of most remaining prisoners. In September, the U.S. government completed the formal handover of control but halted the transfer of dozens of prisoners it did not want freed by Afghan authorities.42 As of September 10, hundreds of prisoners remained under U.S. control.43

“ORDINARY RENDITIONING,” SHOW TRIALS, HUMAN RIGHTS ABUSES

In the months after Obama’s May 2009 speech in front of the National Archives, he appeared to waver on just how bold his executive detention and military commission policies would be. While the administration slowly transferred some detainees cleared for release, the essential nature of the post-9/11 detention policy resumed apace.

In August 2009 came the first glimpse of renditioning under Obama. Candidate Obama, writing in Foreign Affairs two years before, strongly criticized Bush’s practice of “extraordinary rendition.”44 Under Bush, terror suspects were apprehended, transferred, sometimes through secret prisons and black sites, and handed over to foreign regimes like Egypt and Morocco. Sometimes this involved torture. For example, Maher Arar, a Canadian citizen later determined to be innocent, was captured in New York and sent to Syria to endure torture.45

Obama’s criticism of renditioning, along with his general criticism of the Bush administration’s violations of habeas corpus, stood out as one of his most serious indictments of the Republicans’ war on terror. Early in his presidency, officials announced that some renditioning would continue, even with secret CIA prisons, although it would be limited to a “short-term and transitory basis.”46

In August, The New York Times reported that “[t]he Obama administration will continue the Bush administration’s practice of sending terror suspects to third

countries for detention and interrogation, but will monitor their treatment to insure they are not tortured.” The administration put the State Department in charge of monitoring. Secretary of State Hillary Clinton had made waves during the presidential campaign for defending Bush torture policies more than Republican nominee John McCain. The Times further reported on “a new administrative interrogation unit, to be housed within the Federal Bureau of Investigation, which will oversee the interrogations of top terror suspects using largely non-coercive techniques approved by the administration earlier this year.”

The first subject renditioned under President Obama, Raymond Azar, disputed that the program’s techniques were “non-coercive.” Azar was never accused of terrorist or even particularly dangerous behavior. He was a Lebanese construction manager employed by Sima International, a contracting firm working with the U.S. government in Iraq and Afghanistan, and faced accusations of fraud in violation of antitrust law. Allegedly, he had knowledge of a bribe. Azar claimed that for this alleged white-collar offense, he underwent horrible treatment. His lawyers filed papers alleging Azar was hooded, stripped naked and photographed, subjected to a body-cavity search, shown a photo of his wife and four children and told he would never see them again if he refused to confess, then driven to Bagram where he found himself shackled to a chair for seven hours, taken in an unheated metal shipping container during a cold storm with nothing but a thin blanket, and deprived of sleep. He broke down into a confession that his lawyer claimed was illegitimate since it was tortured out of him. For all this to transpire in a case that did not even allegedly involve terrorism speaks volumes about the degradation of the rule of law that continued under President Obama.

In September 2009, the U.S. military closed down Camp Bucca in Iraq, transferring prisoners to Camp Taji and Camp Cropper, its two remaining prison camps in Iraq. Approximately 100,000 detainees had resided in the prison at one time or another in the six years since it opened. Almost all of them had been released. According to Iraqi officials, some returned to violence, and yet none of this seemed to worry the administration, or American public, as much as the freeing of a much smaller number from Guantánamo. This disconnect served as another illustration of the fallacies behind the argument for indefinite detention on the grounds that detainees will become dangerous in the future.

The same month, the administration announced it would not, after all, seek a new detention system. At the same time, the administration argued, as Bush had, that the

49 Johnston, “U.S. Says Rendition to Continue.”
Authorization of Military Force from 2001 provided the executive branch with all the legal justification it needed to detain some people indefinitely without cause.\(^{52}\)

In October, Obama signed the Military Commissions Act of 2009 into law, providing for military commissions for terror suspects at Guantánamo Bay. As with the Bush administration, Obama effectively reasserted his executive authority against the court system, purporting to legalize a system that stood on shaky constitutional ground. The law excluded the use of evidence obtained through torture, although a loophole allowed the secretary of defense to make exceptions. Jameel Jaffer, director of the ACLU’s National Security Project, remarked that “the new law addresses some of the defects of the military commissions [but] fails to bring the tribunals in line with the Constitution and the Geneva Conventions.”\(^{53}\)

In November, the administration announced it would prosecute Khalid Sheikh Mohammed and four other alleged 9/11 co-conspirators in a federal court. This stirred up intense debate among political pundits. As a candidate, Obama had complained that the more solid the government’s case against the defendant, the more the Bush administration would afford him due process. He in particular had pointed out the dissonance of trying Khalid Sheikh Mohammed by military commissions while depriving less guilty detainees of even that much process.

Many noted that trying terror suspects in federal court would hardly coddle terrorists: According to Human Rights Watch, between the 1990s and 2009, 91 percent of terror suspects in civil trials were convicted, and the 9 percent remaining were imprisoned on other charges.\(^{54}\) Some cited such a statistic in defense of civilian courts rather than military justice, although the 100 percent effective conviction rate might raise eyebrows on its own.

The administration assured the public that the civil trial of Khalid Sheikh Mohammed would involve only a façade of due process. When asked whether it was inappropriate to provide a full trial to Mohammed, Obama said, “I don’t think it will be offensive at all when he’s convicted and when the death penalty is applied to him,”\(^{55}\) apparently predicting the result of a trial before it occurred. The administration later backed off from such metaphysical certainty, attempting to walk the line between a certitude that Mohammed would be convicted and allowing the theoretical possibility of acquittal that is necessary for a trial to actually be a trial. Yet even this balance seemed illusory. As the New York Times reported, “Justice Department officials have said that even if Mr. Mohammed is acquitted, the Obama


administration will keep him locked up forever as a ‘combatant’ under the laws of war.”

This underscored the degree to which legalistic technicalities and political posturing can obscure the fundamentals of justice. The Obama administration announced a civil trial of Mohammed to assert America’s respect for the rule of law while allowing other detainees to languish indefinitely and while reassuring the public that none of the substantive qualities of a trial – the possibility of acquittal, or the guarantee of freedom upon acquittal – would apply. The arraignment of Khalid Sheik Mohammed and four alleged co-conspirators in the 9/11 attacks at a Guantánamo military commission took place on May 5, 2012. Criticisms arose in two directions, as some castigated the court for allowing the defendants to turn the arraignment into a thirteen-hour farce during which they refused to enter a plea and had three prayer breaks, and others criticized the process for denying the accused of basic due process rights. Critics questioned the presiding judge’s qualifications, as he had never practiced law or judged a civil trial, and complained of the taint of evidence obtained through torture and the commission’s procedures that some identified as more draconian than those of Bush’s military commissions. Commentators seemed to agree that it was virtually certain that Mohammed would ultimately be executed.

In another example of due process symbolism trumping substance, the administration in 2009 and 2010 formulated plans to transfer Guantánamo detainees to a transformed federal prison in Northern Indiana, where they would presumably be housed indefinitely without trial. Again, even putting aside Obama’s delays in fulfilling his promise to close Guantánamo, the significance of closing it would surely be undermined by continuing the same kind of detention policy within American borders. Indeed, the precedent here – military prisons and indefinite detention on U.S. soil – would pose troubling questions beyond even those raised by Bush’s policies.

On Christmas Day, 2009, an alleged attempted terrorist failed to destroy a passenger aircraft heading from Amsterdam to Detroit. The near-success of his attack demonstrated the failure of the many surveillance, intelligence, and airline security reforms put in place after 9/11. But the incident resulted in a new frenzy of wartime fear, particularly concerning the nation of Yemen, rather than prompting leaders to rethink the U.S. approach to stopping terrorism. The decision to indict the suspect, Umar Farouk Abdulmutallab, in federal court came under fire by critics of the Obama administration, even though this is precisely what Bush had done in the comparable case of Richard Reid, the attempted shoe bomber.

In the political heat of the season, Obama took it out on Yemeni detainees at Guantánamo who had been cleared for release, ordering that their release be delayed. National Security Adviser John Brennan, apparently trying to show that the Obama administration was as tough on terror as its predecessor, assured the media that its release of Yemenis so far “was the result of a very meticulous and rigorous process that we’ve had in place since the beginning of this administration. Now let me put some facts out here. The last administration released 532 detainees from Guantánamo. During this administration, we have transferred in fact 42 of these individuals overseas.” After a year in office, the Obama administration boasted that it had freed fewer Guantánamo detainees per year than the Bush administration had.

On January 22, 2010, the New York Times reported that the “prolonged detention” policy unveiled by Obama in May would apply to dozens of people:

The Obama administration has decided to continue to imprison without trials nearly 50 detainees at the Guantánamo Bay military prison in Cuba because a high-level task force has concluded that they are too difficult to prosecute but too dangerous to release, an administration official said on Thursday.

Around this time, the Guantanamo Review Task Force, commissioned by the president, issued its recommendations, but Obama kept them under wraps due to the political climate arising from the Christmas bomb plot. Later that year the recommendations were revealed. Only 10 percent of the Guantánamo detainees were described as “leaders, operatives and facilitators involved in plots against the United States.” The Task Force found that 126 of the detainees should be transferred to their home countries or another country, 36 should face a military commission or federal trial, and 48 should be held indefinitely.

In April 2010 Obama announced the prosecution, by military commission, of Omar Khadr, a Canadian citizen who was apprehended as a minor in an Afghanistan firefight in 2002, having been shot twice in the back and blinded in one eye, and tortured into his confession of the “war crime” of throwing a grenade. He faced a military commission, despite the evidence based on such interrogation tactics as being threatened with rape, which his interrogator later admitted. Khadr acceded to a plea agreement in October 2010. Colonel Jon Jackson, his lawyer, argued before the sentencing panel that his circumstances should be taken in account: “Omar

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Khadr was a lawful target but he didn’t have the right to fight back.” For being an illegal child soldier, he was sentenced to eight years in prison.

Tales of torture also characterized the story of suspected whistleblower Bradley Manning, a U.S. soldier arrested in May 2010 on suspicion of giving classified information to the WikiLeaks Web site. Among the WikiLeaks revelations were official documents on Guantánamo interrogation practices in which the government concluded 380 detainees were simple foot soldiers and at least another 150 were innocent Afghans and Pakistanis. In April 2011, more than 250 of America’s top legal scholars signed a letter protesting Manning’s treatment:

For nine months, Manning has been confined to his cell for twenty-three hours a day. During his one remaining hour, he can walk in circles in another room, with no other prisoners present. He is not allowed to doze off or relax during the day, but must answer the question “Are you OK?” verbally and in the affirmative every five minutes. At night, he is awakened to be asked again “Are you OK?” every time he turns his back to the cell door or covers his head with a blanket so that the guards cannot see his face. During the past week he was forced to sleep naked and stand naked for inspection in front of his cell, and for the indefinite future must remove his clothes and wear a “smock” under claims of risk to himself that he disputes.

Soon after, officials transferred Manning to Fort Leavenworth. His court martial was set for February 2013, by which time he will have been held for 983 days.

**Habeas Corpus Betrayed Again**

In April 2011, Obama’s Attorney General Eric Holder gave a puzzling statement about the administration’s take on detention policy and the trials for 9/11 suspects. Holder blamed others for the politicization of detention policy and “scolded Congress for suggesting that the federal court system could not handle a terrorism case,” according to CBS News. In particular, the attorney general protested that “the prosecution of Khalid Sheikh Mohammad and his co-conspirators should never have been about settling ideological arguments or scoring political points. . . . Too many people – many of whom certainly know better – have expressed doubts about our time-honored and time-tested system of justice.”

Thus, the attorney general criticized Congress for questioning the administration’s original decision to try Khalid Sheikh Mohammed by civil trial. But his reasoning carried ominous implications for civil liberties:

Decisions about who, where and how to prosecute have always been – and must remain – the responsibility of the executive branch. Members of Congress simply do not have access to the evidence and other information necessary to make prosecution judgments. . . . I know this case in the way that members of Congress do not . . . I respect their ability to disagree, [but] this is an executive branch function – a unique executive branch function.

Obama – and most liberals – criticized Bush’s detention policy on at least two grounds: one, that such procedures as military commissions were inherently more lawless than normal prosecution, especially without the protections afforded to POWs in an officially declared war; and two, such decisions, while appropriately a function of the executive branch, were not to exclude the role of Congress and the federal judiciary. Congress, a coequal political branch, has the authority to shape detention policy with the executive. And the court system has the right to question such detentions and ensure that bare minimum legal requirements, such as the right of habeas corpus, be respected. But now Obama’s attorney general made the exact opposite point – that the executive branch knows better than Congress (or the people, presumably) how to handle detention policy, which is its dominion alone. What’s more, he simultaneously criticized Congress for not having trusted civilian trials while defending the president for not wanting to go through with civilian trials.

Therefore, even after numerous Supreme Court decisions and a presidential election where the winner won on a program of “hope” and “change,” including a retreat from the radical anti-judicial detention policies of the Bush administration, not much changed by the second half of Obama’s first term. Guantánamo remained open and thousands of detainees sat at the Bagram prison without even the rights afforded to Guantánamo detainees under Bush, whose ad hoc “enemy combatant” policies were retooled and became institutionalized as a bipartisan policy of “prolonged detention.” The Obama administration even used state secrets multiple times to cover up torture and crimes of extraordinary renditioning, reportedGlenn Greenwald, “Obama and Transparency: Judge for Yourself,” Salon.com, June 17, 2009. reportedly relied on limited use of CIA secret prisons in Somalia and Afghanistan,Jeremy Scahill, “The CIA’s Secret Sites in Somalia,” The Nation, August 1–8, 2011; Kimberly Dozier, “Afghanistan Secret Prisons Confirmed by U.S.” The Huffington Post, April 8, 2011. and continued the renditioning program in an altered form.

Despite many people’s high hopes, the Supreme Court’s landmark decisions during the Bush years did not bring relief to as many detainees as was expected. Following the Boumediene decision, there was what Andy Worthington calls “a golden period for accountability, as, between October 2008 to July 2010, 38 out of
52 prisoners won their habeas corpus petitions.” In 2010 the U.S. Court of Appeals for the District of Columbia overturned a Yemeni detainee’s release in al-Adahi v. Obama, reversing the trend of release. Before that, 56 percent of 34 Guantánamo detainees had won their cases in District Court. After the al-Adahi ruling, only Adnan Farhan Abdul Latif, who was captured on the Afghan-Pakistan border in 2001, won release in District Court, and this was quickly overturned by the DC Circuit in 2011. As of November 2011, eighty-nine detainees recommended for release by the Guantánamo Task Force nearly two years before remained in detention. Most were denied their freedom because of their Yemeni nationality.

Particularly dramatic was the plight of the Uighurs, Chinese Muslims taken in by the Northern Alliance in Pakistan and brought to Guantánamo in 2002. The main rationale for keeping them detained was very dubious Chinese government propaganda. In October 2008, District Judge Ricardo M. Urbina issued a writ of habeas corpus and ordered their release in the United States. The Bush administration insisted that the federal judiciary did not have the authority to remedy their illegal detention. Obama took the same position in April 2009. His administration also echoed the Bush argument that the courts could not scrutinize the transfer of Guantánamo detainees to other countries, even when there was a concern of torture in the new location. As of October 2012, three Uighurs whom the government conceded were not enemy combatants remained stranded at Guantánamo, thanks to Obama’s efforts to prevent their transfer to the United States.

In April 2012, the Supreme Court denied cert in Gul v. Obama, a case involving conditions of detainees’ release, and in Abdah v. Obama, concerning the circumstances surrounding detainees’ transfer. In both cases, the DC Circuit had ruled against the detainees. In June 2012, the Supreme Court declined the appeals of seven detainees whose release was stifled by the DC Circuit. The Boumediene decision was a dead letter.

In September 2012, Guantánamo prisoner Adnan Latif was found dead after a decade of hunger strikes and suicide attempts. Latif had been cleared for release numerous times, including by the administration and the federal judiciary, only to

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see his release blocked by the executive branch and the DC Circuit Court and his case rejected by the Supreme Court. Latif’s death marked a tragic statistic: The last three prisoners to leave Guantánamo left dead rather than alive.

NORMALIZING UNLIMITED EXECUTIVE POWER

In January 2010, it was reported that President Obama had a secret “hit list” of American citizens abroad. The CIA or military could summarily execute these Americans deemed “enemies.” Whereas early critiques of Bush’s post-9/11 terror policies often focused on the deterioration of checks and balances and the executive prerogative to strip people, even citizens, of their rights without due process, here Obama appeared to regard himself judge, jury, and executioner. Glenn Greenwald trenchantly wrote,

Amazingly, the Bush administration’s policy of merely imprisoning foreign nationals (along with a couple of American citizens) without charges – based solely on the President’s claim that they were Terrorists – produced intense controversy for years. That, one will recall, was a grave assault on the Constitution. Shouldn’t Obama’s policy of ordering American citizens assassinated without any due process or checks of any kind – not imprisoned, but killed – produce at least as much controversy?

On September 30, 2011, the CIA, acting on Obama’s order, targeted a drone attack to kill American citizen Anwar al-Awlaki, a radical Muslim cleric who advocated violence against the United States and was said to be involved in terrorist plotting. His son, a sixteen-year-old U.S. citizen, also died in the attack. The president now claimed the power not just to detain American citizens without due process, but to order them executed. In March 2012, Attorney General Eric Holder gave a lecture at Northwestern University School of Law where he defended this presidential power, arguing that “the Constitution guarantees due process, not judicial process.” In exercising this awesome authority, the president should not be subject to a court’s interference:

The Constitution’s guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.

That is not to say that the Executive Branch has – or should ever have – the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.\footnote{81}

In November 2011, an amendment to the National Defense Authorization Act cosponsored by Senators Carl Levin and John McCain proposed to legalize executive military detentions of suspected terrorists, including those apprehended on U.S. soil. The Obama White House initially threatened to veto it, but did so because it saw it as congressional micromanagement of executive detention power, not because it would be a violation of civil liberties. By this point, virtually everything in the bill was de facto policy anyway.\footnote{82}

On December 31, 2011, sitting in his vacation home in Hawaii, President Obama signed the NDAA into law after all, finalizing the codification of the president’s power to indefinitely detain American citizens.\footnote{83} In May 2012, District Judge Katherine Forrest ruled that the law’s most controversial provision, mandating military custody and indefinite detention for terrorist suspects, was unconstitutional.\footnote{84} In late May, the White House asked Forrest to rescind this order and indicated it would veto legislation being considered in Congress that would place some limits on executive detention prerogative. Forrest refused. On September 12, Forrest issued an injunction to halt enforcement of part of NDAA. The Second U.S. Circuit Court granted an emergency freeze of this ruling on September 18 and in October agreed to hear the administration’s appeal.\footnote{85}

In October 2012, The Washington Post reported the Obama administration’s plans to keep adding names to its new “kill list,” which officials called a “disposition matrix,” giving every indication that the administration intended the war on terrorism and targeted killings to continue for at least another decade.\footnote{86}

Despite Obama’s clear political mandate to restore civil liberties and, at least at one point, a 68 percent majority of Americans opposed to indefinite detention, detention policy continued almost exactly as Bush practiced it. If anything, Obama’s ascent to power contributed to a public dialogue less hostile to indefinite detentions,
military commissions, and the like. One chilling example of the decline in American civil libertarianism concerned torture. According to an Associated Press poll in June 2009, “Some 52 percent of people say torture can be at least sometimes justified to obtain information about terrorist activities from suspects, an increase from 38 percent in 2005 when the AP last asked the question.”\(^{87}\) Similarly, a Washington Post/ABC News poll in early 2012 found that “53 percent of self-identified liberal Democrats – and 67 percent of moderate or conservative Democrats – support keeping Guantanamo Bay open, even though it emerged as a symbol of the post-Sept. 11 national security policies of President George W. Bush, which many liberals bitterly opposed.”\(^{88}\)

Regarding deprivations of habeas corpus, perhaps an insidious political dynamic is at play: If even a constitutional lawyer and liberal Democrat supports such policies, then the debate shifts in terms of what’s considered extremist advocacy of executive power and what is considered a principled defense of civil liberties.\(^{89}\) Neal Katyal, defense attorney for Hamdan during the Bush administration and a strong opponent of Bush’s policies, became principal deputy solicitor general of the United States under Obama – but far from this marking a shift toward concern about civil liberties, it rather shows the temptation of power can lure even habeas enthusiasts. In 2007, Katyal teamed up with a former Bush attorney, Jack Goldsmith, to argue in the New York Times for a “comprehensive system of preventive detention that is overseen by a national security court.” In December 2008, after Obama’s election, David Cole, a premier critic of Bush detention policy, argued that members of al Qaeda should be indefinitely detainted, regardless of where they’re captured. Kenneth Anderson, American University law professor, posed the obvious rejoinder: If such “preventative” detentions were “sensible and legal now,” why were they not “sensible and legal during the Bush years”? Jonathan Hafetz of the ACLU noted that preventatively detaining only members of al Qaeda would be impossible.\(^{90}\)

Hafetz, in criticizing aspects of the Boumediene decision, took issue with its jurisdictional test. Instead, the Court “should have made clear that habeas corpus is available to all individuals detained by the United States, regardless of where they are held, without a valid suspension of the writ by Congress.”\(^{91}\) However, aware that habeas might be impractical in some theaters of war, Hafetz conceded that habeas “review might be extremely limited, even pro forma, in some circumstances . . . [A] court need not conduct an individualized inquiry into each detainee’s allegations. Instead, a court could defer to the findings of a properly constituted military tribunal” in some cases. Although courts could investigate matters deeply, “the ordinary

\(^{91}\) Hafetz, Habeas Corpus After 9/11, 176.
The Power of Habeas Corpus in America

rule [c]ould be summary dismissal of wartime petitions in international armed conflicts.”

Hafetz, writing in the Obama era, argued for a much broader use of habeas than currently available, yet one that still, due to practical concerns, must defer to the executive branch. He also noted an inherently severe limitation in habeas:

The enduring strength of habeas corpus is that it requires the state to justify a prisoner’s detention before an independent court. . . . But in that strength lies a weakness: the incentive it creates for the state to structure its detention operations to avoid habeas corpus altogether or to curtail the court’s ability to grant an effective remedy.

In a decade of the war on terror, practical wartime concerns and politics belied the idealized force of the Great Writ. “[A] number of Guantanamo detainees have been held for years even after it was established that they were not ‘enemy combatants.’”

This recent history, along with nearly a millennium of habeas history before it, speaks to a need for habeas advocates to look beyond the technicalities of court decisions, the vagaries of politics, the promises of candidates, and the obscure details of statutory law and jurisprudential experimentation. What is needed is a cultural shift, a new societal understanding that embraces not just the narrow legal arguments used to rebuke the Bush administration, the technicalities that obstructed Bush at one point only to become obsolete as soon as the MCA passed, the types of arguments that Obama exploited in his quest for the Oval Office, only to turn around and defy the spirit of his promises. What is needed is a profound appreciation for the broader and deeper principles that underlie habeas corpus and the seven-century struggle to place the executive custodian under judicial scrutiny, a struggle to ultimately secure the liberty of those who have been wrongly detained, a struggle that shall continue until a respect for that liberty is cherished, and demanded, by society at large.

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93 Hafetz, *Habeas Corpus After 9/11*, 204.
PART III

Custody and Liberty
A paradox flows through the course of habeas history. For centuries, the writ’s champions touted its role in defending the individual against the state. Habeas became “the most celebrated writ in English law” for its liberating function. Yet the Great Writ, like all judicial writs, is a government power. It is a judicial order, typically issued from one official to command another to justify a detention. The state uses this process to legitimize its detentions and ensure they follow its standards of conduct.

The paradox of power and liberty lies behind every habeas controversy. Those who emphasize power see the writ’s origins and development in terms of jurisdiction. Those focusing on liberty instead interpret the writ’s true story along more idealistic lines. The controversy over Edwards Jenks’s famous description of the writ’s original function – “not to get people out of prison, but to put them in it” – stems from contrasting narratives that focus on one or the other side of the writ’s legacy, both of which have a compelling grounding in history. The tension within the writ’s very mechanics reverberates in all debates over habeas’s true origins, purposes, evolution, and appropriateness in modern detention policy.

Scholars might do best to focus on power to understand the writ as it has actually existed and on liberty to decide on what they would like it to be. The interests of state authority, not freedom, tended to determine both the growth and retrenchment of the habeas remedy. Even as judicial bodies extended their habeas reach to vindicate

3 Jenks, 65.
rights and restrain detention power, they did so in direct service of their own power and for political and practical reasons, and generally toward the long-term expansion of the power of the centralizing state. The central role of power appears in most judicial arguments concerning the scope of habeas in one area or another. On many occasions when the writ’s advocates gained power, they curbed habeas upon seeing it interfere with their priorities.

Courts in England broadened and seized the writ as a way to assert their own power. The Parliamentarians championed the writ in language of high principle, only to switch sides and suspend it when the king’s partisans used it against them. The famous Habeas Corpus Act of 1679, “the most wholesome law,” was passed not simply to placate the masses, but with the specific desire to protect members of the House of Lords from being arrested by members of the House of Commons. Parliament soon enough suspended the writ to deal with political opponents.

American colonists demanded home-rule in their quest for habeas, defying English power in perhaps the most liberty-oriented adoption of the writ, although soon enough the Americans acceded to the consolidation of political authority in the ratification of the U.S. Constitution, which centralized habeas corpus through the counterrevolutionary Suspension Clause. Thomas Jefferson asserted that it should never be suspended, but once in power, he tried to suspend it himself.

Habeas served both power and liberty in its dual use in protecting and undermining slavery, but power triumphed when the central state sided with the Peculiar Institution, using the great writ to enforce the Fugitive Slave Act, culminating in the destruction of state habeas review of foreign detentions in Ableman v. Booth and Tarble’s Case. Judge Roger Taney railed against Lincoln for his abuse of the Great Writ, but it was Taney who, in Ableman v. Booth, gutted the most radical use of the writ in American history – its employment by state courts against federal detentions so as to undermine federal enforcement of slavery. The burgeoning U.S. warfare state from the War of 1812 to the Civil War demonstrated the ease with which the executive power could overcome, circumvent, and suspend the writ’s protection. The Reconstruction government extended habeas corpus in the name of liberty, only to restrict it when the writ threatened its own authority.

The statutory dominance over habeas jurisprudence – which had extended review through the 1833 Force Act and 1867 Habeas Corpus Act, only to restrict it in legislation from the 1948 Judicial Code to the 1995 Anti-Terrorism and Effective Death Penalty Act – moreover tied the writ down to the technicalities of codification, compromising its evolutionary common-law liberation potential. Meanwhile, power lurked behind the U.S. Supreme Court’s every effort to define its proper reach of federal habeas over state criminal justice procedure. The Court reached into

4 Duker, 48–51, 56.
5 542 U.S. 507, 565.
6 The non-retroactivity principles of AEDPA were upheld for a Pennsylvania conspiracy and murder case in November 2011, in Greene v. Fisher, 565 U.S. ___ (2011).
state proceedings with such celebrated decisions as *Frank v. Magnum*, *Moore v. Dempsey*, *Brown v. Allen*, and many others. The decisions turned on interpretations of the Fourteenth Amendment, comity, finality, exhaustion, innocence, custody, and federalism. The major issues tackled pertained to one governing body’s power relationship to another’s. Chief Justice Earl Warren advanced a most activist use of federal habeas corpus to state detentions, yet a skeptic might suspect he did this to extend his federal authority. As California’s attorney general, the same man ardently supported Japanese Internment, also an aggrandizement of federal power, a program that detained far more individuals without due process than his judicial activism ever freed.

From the Civil War and World War II to the war on terror, the executive demonstrated its capacity to conduct mass detentions of people without charge, hold civilians in indefinite custody, and push the boundaries of the accepted use of military commissions. In every case, judicial authorities either tried and failed to protect detainees through habeas or did not even bother trying. Although these detentions always raised questions of power’s conflict with liberty, the federal judiciary often adjudicated matters with a focus on the executive power’s boundaries in relation to the powers of the other branches. In the Civil War, Chief Justice Taney complained that Lincoln could not suspend habeas on his own. The president then proceeded to have Congress do so. In World War II, the Supreme Court deferred to the executive on the Nazi saboteurs and later asserted that Japanese-Americans had limited habeas corpus privileges, although this hardly served as a fundamental rebuke of the injustices of Internment, which the Court meekly found resided within the president’s proper authority. In the war on terror, the Supreme Court repeatedly repudiated Bush policies for their insufficient reliance on congressional authority and judicial oversight, yet in the end the Bush and Obama administrations found ways to formally obey the Court’s orders while soliciting the help of a complicit judiciary and Congress to craft policies of indefinite detention and military law that circumvented the revered spirit of the Great Writ. Obama, in particular, was a vocal advocate of the Great Writ’s sweeping powers until he became the president, at which point he immediately found ways to justify indefinite executive detention and curb judicial interference.

In response to Bush’s detention policies, many legal scholars early on focused on questions of the separation of powers rather than the rights of detainees. In his paper “Habeas Without Rights,” Jared Goldstein, an attorney defending Kuwaiti prisoners at Guantánamo, argued that he had seen *too much* emphasis on the rights of the detainees, rather than the legal powers shared by the executive and judicial branches. His paper argues that habeas relief does not require the possession of rights... [A]lthough the courts have not decided whether the Guantánamo detainees possess enforceable rights, they have uniformly and mistakenly concluded that the detainees’ habeas claims, as well as the habeas claims brought by other accused enemy combatants,
require a showing that the detainees possess cognizable rights violated by the deten-
tions, most especially rights protected by the Constitution. . . . [F]or most of the long
history of habeas corpus, courts resolved habeas claims without undertaking any
inquiry into the petitioner’s rights by determining whether the jailer had authority
to impose the challenged detention. Habeas did not address “rights” in the modern
sense of a discrete group of personal trumps against governmental action, such as
those protected by the Bill of Rights. Habeas did not protect rights in this sense for
a simple reason: habeas predates rights.7

The writ of habeas corpus indeed predates the modern conception of negative
liberties and the individual’s rightful freedom from government encroachment. Even
today, emphasizing power rather than rights is often a better tactic in the
courtroom, where judges care more about the boundaries of their own authority
than what they might view as the abstract consideration of personal liberty.

In his recent and excellent book Habeas Corpus in America: The Politics of
Individual Rights, Justin Wert argues for a new emphasis in habeas scholarship, one
focusing on the political side of the writ rather than only the judicial. Far from being
an independent instrument outside the normal operations of government, habeas
corpus has always existed within a political context and has generally functioned as
“a powerful tool in regime enforcement and maintenance,” which “serves regimes
in part by giving legal and constitutional legitimacy to the authority that they need
in order to govern.”8 Changes made to the writ by Congress, the president, and the
courts themselves “all have to be mediated through the appropriate political institu-
tions,” and major reforms in habeas jurisprudence are “often initiated and led by a
coalition of other institutions in American government, including Congress, the presi-
dent, political parties, state governments, legal academics and jurists, and interest
groups.”9

Seen through this lens of political science, American habeas history takes on a new
coherence. As the antebellum era morphed into the Civil War, the “state-led habeas
developments stood as competing alternatives between a dissolving Jacksonian
regime and an ascending Republican one.”10 Many years later, habeas operated as
“an enforcement tool of the regime during World War II,”11 acceding to Japanese
Internment, and later grew in its scope over the states to enforce Civil Rights along
with the Great Society. The conservative upswing in American politics accompanied
habeas corpus’s retrenchment. As for the war on terror, Wert argues that it, along
with other wars, is best seen not as an aberration in habeas history but as a dramatic
example of habeas being used as a political tool.

7 Jared A. Goldstein, “Habeas Without Rights,” 2007. Roger Williams University School of Law Faculty
8 Wert, Habeas Corpus in America, 3, 6.
9 Wert, Habeas Corpus in America, 8, 2–3.
10 Wert, Habeas Corpus in America, 70.
11 Wert, Habeas Corpus in America, 162.
Yet Wert provides a major caveat to his thesis that, while certainly not undermining it, complicates our evaluation of historical events. There were times – such as between the 1880s and 1960s – when the Court appeared less deferential to political winds and more protective of its own institutional integrity. Moreover, “[n]o matter how sympathetic a Court might be to the forces dominating American politics, it has always stopped short of supporting the regime when its own institutional legitimacy was at stake.”

Even during World War II, “we still saw the Court refusing to relinquish its own institutional power to issue the writ.” And even during the Bush years, “a regime-affiliated Court tried its best to hew to the Bush administration’s and Congress’ preferred policies. . . . Still, the Court only followed the regime’s wishes until its preferred polices prevented federal court participation through habeas corpus altogether.”

One might wonder how many conclusions we can draw about a Court’s orientation being “institutional” rather than “political,” especially in opinions split almost down the middle. Moreover, judges are appointed politically but have their own judicial ideologies that include ideas on deference to the political branches as well as institutional loyalty to the judiciary. One way to reconcile these issues is to reflect on where institutional and political incentives dovetail: They both concern power.

Courts deferring to felony convictions uphold state-level government power. Courts upholding the president’s authority to detain “enemy combatants” tip their hats toward executive power. Finally, courts challenging or overturning detentions also act to affirm power – their own. Because the writ of habeas corpus grew out of the royal court system, the distinction between judicial power and executive power was originally murky at best. Centralization and usurpation, more than liberation, characterize habeas history.

On the other hand, most exercises of the habeas power are done in the name of liberty. Courts intervene in criminal processes and executive detentions in the guise of the prisoner’s freedom. Even when a judge defers to a president or state-level trial, the deference itself carries with it the rhetoric of liberty – the liberty to be safe from criminals, federal encroachment, or foreign terrorists.

Putting aside the vagaries and inconsistencies that accompanied its practice and development, the Great Writ has unmistakable significance in the way a society views itself and for the principles it claims define its civilization. As Cary Federman has written in *The Body And the State: Habeas Corpus And American Jurisprudence*, the fundamental questions raised by habeas corpus pertain just as much to the way in which people perceive and discuss legal reality as to the way legal business is conducted:

13 Wert, *Habeas Corpus in America*, 162.
The writ reveals a breach, not just institutionally but also in language. It exposes a different way to understand the law, one based on the reality and harshness of the criminal justice system for those unable to secure quality counsel.\textsuperscript{15}

Federman elaborates on the discursive themes involved in habeas and reemphasizes the important principle of empowering the least empowered – the prisoner, with all the weight of the state against him – to take the state’s mechanisms for his own interest and redirect them back against the state:

Habeas corpus . . . gives the dangerous classes more than a voice; it gives them a weapon to attack a jury’s psychological determination of guilt and dangerousness. It gives the condemned a language to rebut the charges, convictions, misrepresentations in the same terms that were used against them. Habeas petitions turn legal language upside down and with it, the historical evolution of federal-state relations.\textsuperscript{16}

Michigan Supreme Court Justice Thomas M. Cooley also emphasized this reversal of the state against itself for the sake of the prisoner’s individual liberty:\textsuperscript{17}

The important fact to be observed in regard to the mode of procedure upon this writ is that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.

This reliance on government power to check the government’s depredations, however, also spells a paradox. Moreover, the discursive use of habeas corpus in causing a revolution in thinking about legal affairs brings with it potential disadvantages. As Jordan Steiker has pointed out, “the very existence of federal habeas, even in its increasingly truncated form, unjustifiably alleviates anxiety about the accuracy of state court capital proceedings.”\textsuperscript{18}

Jeremy Bentham made a related point regarding the English experience and the power to suspend the writ:

As for the habeas corpus act, better the statute book were rid of it. Standing or lying as it does, up one day, down another, it serves but to swell the list of sham securities, with which, to keep up the delusion, the pages of our law books are defiled. When no man has need of it, then it is that it stands; comes a time when it might be of use, and then it is suspended.\textsuperscript{19}

Concerning executive detention power, Jonathan Hafetz has noted that

\begin{itemize}
\item \textsuperscript{15} Federman, 12.
\item \textsuperscript{16} Federman, 18.
\item \textsuperscript{17} Matter of Jackson, 15 Mich. 417, 439, 440 (1867).
\item \textsuperscript{18} Steiker, “Did the Oklahoma City Bombers Succeed?” 191–2.
\item \textsuperscript{19} Church, 38, citing 3 Bentham’s Works, 435.
\end{itemize}
Habeas review can even legitimate the very abuses that it is meant to prevent by giving illegal executive action a judicial stamp of approval. We need only recall the Supreme Court challenges to the internment of 120,000 Japanese Americans during World War II to realize that judicial review does not necessarily ensure justice or vindicate constitutional rights.\textsuperscript{20}

One might counter that any seeming irony in trusting the state to curb its own abuses could just as easily apply to other checks and balances, all the way to the notion that the state should provide adequate legal counsel to those who cannot afford their own. Yet the accusation that this proves too much misses the mark. The doubt that checks and balances effectively guard individual liberty traces back to the American Revolution. In 1776, Thomas Paine mused in his famous pamphlet \textit{Common Sense}, which sparked revolutionary fervor in America:

To say that the constitution of England is an \textsc{union} of three powers, reciprocally \textsc{checking} each other, is farcical; either the words have no meaning, or they are flat contradictions.

First. – That the King is not to be trusted without being looked after; or in other words, that a thirst for absolute power is the natural disease of monarchy.

Secondly. – That the Commons, by being appointed for that purpose, are either wiser or more worthy of confidence than the Crown.

But as the same constitution which gives the Commons a power to check the King by withholding the supplies, gives afterwards the King a power to check the Commons, by empowering him to reject their other bills; it again supposes that the King is wiser than those whom it has already supposed to be wiser than him. A mere absurdity!\textsuperscript{21}

In this passage, Paine made an observation far more radical than anything he said in questioning the King’s power on the basis of heredity or physical distance from the colonies. Indeed, even Paine, who considered government “at best” to be “a necessary evil,” may have distanced himself from the passage’s logical implications: this indictment of the British system of government applies every bit as much to the U.S. government’s legal system, or that of any government ever conceived.

If it is a “mere absurdity” to think that the king should check the Commons and yet the Commons should check the king – if this notion betrays a simultaneous mistrust in both executive and legislative authority as well as a naive faith in the constituent parts of the system as a whole – this mistrust could apply as well to a constitutional system of government, such as that of the United States. If Americans can trust Congress, why do they need a president? If they can have faith in the president, what’s the need for Congress? Regarding habeas corpus, if the people

\textsuperscript{20} Hafetz, \textit{Habeas Corpus After 9/11}, 203.

cannot trust the executive to detain prisoners without a judge’s approval, why would they trust the executive to detain anyone in the first place?

One could easily respond that the people do not trust their government, hence the power of habeas corpus. But insofar as the existence of the judicial remedy calms fears about an out-of-control executive, an illusion might be under way. Most Guantánamo prisoners were freed without any traditional habeas corpus remedy. Tens of thousands were released from prison camps in Iraq without any judicial protection. John Walker Lindh, the “American Taliban,” enjoyed civil process and found himself sentenced to twenty years, whereas Yaser Hamdi, captured in nearly identical circumstances, was initially deprived of habeas corpus but set free much more quickly. Furthermore, the United States had at the beginning of the twenty-first century two million domestic prisoners, many convicted of crimes that were not seen as crimes only a few decades before. The existence of habeas corpus, though itself not an evil, may numb the concerns that great evils have been committed by the executive and criminal justice system.

Federman roots a significant part of his analysis in the method of philosopher Michel Foucault, who has deconstructed many social institutions, including the prison system, and found that power relations have as much to do with the way people discuss matters as they do with the sheer use of physical force. Indeed, force alone cannot sustain governmental structures. Political institutions rest on a foundation of ideas. Not only post-modern theorists have studied the role of public ideology in sustaining state power. Many others, including Robert Higgs, Murray Rothbard, and Franz Oppenheimer, have focused on the key function of public opinion.

If the goal is to ensure a free society that does not imprison people without a minimum standard of justice, another paradox arises. Given this goal, the people must see due process and the rule of law as prerequisites, so that a government unbound by such mechanisms as habeas corpus loses some of its legitimacy. The people must also, however, recognize that the existence of habeas alone does not ensure legitimacy and justice. The state loses its moral high ground insofar as it compromises habeas corpus, yet it is dangerous to give the state too much credit merely for formally respecting the writ.

Foucault himself recognized that a social attitude toward an institution could yield consequences opposite of what is expected. Condemning repression can actually enhance a culture’s repressiveness. Applying this principle to Federman’s analysis reveals the paradoxical way in which adopting habeas corpus as part of societal discourse may undermine social vigilance in guaranteeing individual liberty.

In particular, Federman finds that the nationalization of habeas corpus was crucial in its development into a discursive and mechanical tool on the individual’s side—“By accusing the state of acting illegally, the habeas petitioner aligns himself with the national over the local, with reason over prejudice, with law over vengeance.” However, this view neglects the way that the nationalization of habeas accompanied an expansion of the criminal justice system, the courts’ failure to provide as effective a remedy to state detentions in the bulk of cases, and the federal government’s use of the language of habeas corpus going back to the Suspension Clause’s adoption to pervert the writ’s meaning, betray its purpose, and obscure society’s power relations. Was expanding federal habeas corpus over state detentions with the goal of enforcing federal taxation in the 1830s, and then using that law to enforce the Fugitive Slave Act, for example, really an example of law and reason superseding prejudice and vengeance?

The presence of the U.S. Constitution, which purportedly guarantees liberty, may in fact allow the U.S. government to behave in ways totally destructive of this document’s principles, using it as a cover. Just as Great Britain’s unwritten constitution has become part of that state’s civic religion, so too has the U.S. Constitution become a fig leaf for the U.S. government’s violations of individual rights. The idea that the government follows a “rule of law” can lead people to tolerate its lawlessness.

George W. Bush, as president, repeatedly stressed that his administration’s detention policy followed the rule of law, the Geneva Conventions, and the Constitution, even though this policy by most reasonable interpretations ran counter to all three. Had he announced to the world that he was making up the law as he was going along, perhaps his lawbreaking would have been easier to identify and rein in. Similarly, Barack Obama, standing in front of the National Archives in May 2009, spoke highly of the Constitution sitting behind him and stressed the importance of the rule of law, all the while unveiling his new program of extraconstitutional “prolonged detention.”

The many technical developments in habeas corpus law feature strong opinions on all sides of every imaginable controversy. For hundreds of years, scholars have argued on multiple sides about what the Great Writ has “always meant,” what its limits “always were,” and how its more technical elements should clearly be interpreted in light of real-world circumstances, statutes, and court decisions going back centuries. On the basis of technical arguments alone, all sides have valid points. Enough precedent exists to make a colorable case for liberal habeas corpus activism or for a restrained federal judiciary on virtually any specific question. But out of this Great Writ of liberty, which emerged amid power struggles and evolved into one of the most enviable features of the Western legal tradition, perhaps a moral principle

24 Federman, 50.
25 Even in the most active years, the number of federal habeas claims from state defendants was hardly more than 10,000 per year. Of these, only a small percentage get relief from the process. See Victor E. Flango, “Habeas Corpus in State and Federal Courts” (State Justice Institute, 1994).
might emerge that goes beyond all the legal jargon and case law. If habeas corpus is as meaningful as everyone claims, then perhaps it can take on a life of its own that not only reaches the foundations of our legal system but transcends it. Perhaps what is lost in much of the discourse over habeas corpus – discourse that both undermines and paradoxically bolsters social faith in the state – is its essence, a meaning whose radical implications even many devotees of the Great Writ are so far unprepared to consider.
It seemeth to me unreasonable to send a prisoner, and not withal to signify the crimes laid against him.

– Acts (25:27)

The history of habeas corpus is one of power relations. Yet in this story another principle perennially appears, yearning to be freed from the yoke of technical arguments, judicial loopholes, and back-and-forth polemics over federalism, original intent, and the like. Clearly, the Great Writ has hardly followed a clean linear development toward becoming an effective remedy against tyrannical imprisonment. Although the English writ evolved from a privilege of officials and a method for judges to amass money and power into a clarion call for justice and as an instrument to secure the rights of the falsely detained, the development was rocky and often more symbolic than tangible. The writ originated as a centralizing judicial tool in most of English history only to become a decentralizing check wielded by American state courts against federal detention, then once again became an instrument of consolidation in the hands of the federal government. It is tempting to dismiss the radical American writ in colonial and to some extent antebellum times as an aberration. As early as the Constitutional Convention the writ was on a trajectory back toward its original centralizing function.

Habeas’s unsteady development stifles attempts at an idealistic narrative. The writ’s reach broadened in some ways and became narrower in others. It started primarily as a pre-conviction device and became a post-conviction remedy. It began as judge-made law and ended up constrained heavily by statute. In England, “successive applications” were normal, because the principle of res judicata applied only to judgments, not orders. In the United States, repetitive applications became curtailed by legislation as emphasis came to fall on the “finality” of previous decisions. The high principle of freedom easily becomes lost in the technical debates throughout history over whether judges could issue writs while on vacation, what
particulars determined custody, what satisfied jurisdiction requirements, whether civil habeas corpus restrained military detention powers, and what defined and who could undertake suspension.

In the United States, the criminal justice system became so enormous so as to render it impossible for the federal courts to give each convict, to say nothing of each criminal defendant, the quality of due process that would exist for a much smaller prisoner population. The broadening of federal habeas corpus to oversee state convictions and to act as an approximate substitute for the appeals process brought with it intractable problems of balancing the interests of “finality” and economical use of resources against the ethical demand for justice. This difficulty, along with ideological swings back and forth in the federal judiciary and statutes that have reined in the federal courts, made the job of habeas corpus attorneys more a matter of arguing technicalities than of fighting on the basis of pure principle. The writ that judges created became constrained by complicated statutes and hundreds of years of case law. After the Anti-Terrorism and Effective Death Penalty Act, habeas practice became a job of circumventing the intentions of Congress and judicial conservatives in order to afford a client the best chance available to challenge imprisonment. As one practitioner’s guide states,

[W]inning a habeas corpus case for the petitioner has become in no small part a matter of developing a bolt-hole theory of the case: a narrow argument through which your individual client can be slipped away to freedom, with a door somewhere in the passageway that can be slapped shut in the faces of all other prisoners seeking to follow.¹

In cases of executive detention at wartime, defendants also argued that their case was special and not like other detentions. Rather than upholding the doctrine of liberty for all, habeas corpus at the dawn of the twenty-first century had turned into a plea that some prisoners not be treated like others. Skilled criminal defense attorneys can hone their skills constructing such a narrow case for their clients, on whose behalf their efforts deserve admiration from civil libertarians. But it would be a sad finale for habeas corpus if its last chapter merely told the tale of a writ reduced to technicalities and loopholes.

Habeas’s complicated and multifaceted history does not lend itself well to either the typical conservative or typical liberal interpretations of judicial intervention. The conservatives who decry judicial activism and instead champion constitutional literalism and the rule of law are in a bind. Judges created habeas corpus. The common law tradition, as it stood at the time of the nation’s founding, saw the birth of American habeas corpus in the actions of judges attempting to expand and build upon the fluid tradition of habeas corpus that had existed in England.

This juncture is where the conservatives in Boumediene missed the common law forest for the original intent trees. They argued that the meaning of the common

¹ Hertz and Liebman, x (foreword).
law writ protected by the Suspension Clause could be found in the Crown’s use of the writ at the time of the U.S. Constitution’s adoption. But it was the inconsistent reach of protections of the Crown’s subjects in remote territories, including the alleged failure of habeas corpus to reach such places as Quebec, and the weakness of its effectiveness in the American colonies, that in large part motivated the American revolutionaries in the first place.²

The Crown’s habeas writ, a judicial remedy controlled in large part by the executive branch, was in many ways unsatisfactory and became weaker and more selectively observed up to the day the thirteen colonies seceded. The United States adopted doctrines alien to England, such as the separation of powers. Moreover, the “common law,” as appreciated as an inspirational rallying cry for the colonists, was not the English version that so often prioritized executive (and Parliamentary) detention power above the courts’ ability to scrutinize it. American common law was an Americanized species that gained appeal for its crystallization of the principles of natural law and individual liberty. Americans respected common law insofar as it restricted the executive’s prerogative, not for its status as a patchwork of legal custom that was ultimately subservient to the state.

English common law at the time of the Revolution and Constitution’s ratification is an important guide, but its insufficiency in practice to restrain the Crown was a major complaint of the colonists that carries implications for the proper reach of American common-law habeas corpus. The executive branch’s power to rule a territory without effectively being bound by legal safeguards stood at the very center of what the Americans revolted against. After all, they had complained about the Crown’s “abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.”³

The American reception of common law depended upon the American embrace of the principles of individual liberty. The colonists proclaimed habeas corpus as a right independent of England’s extension of legal norms and codes to the New World.⁴ This American common law preexisted the federal government, and there is no persuasive historical argument that the Framers intended to bring into existence a new executive branch with detention powers as free from the confines of habeas corpus as were the Crown’s executive detention powers. The Constitution does not specifically authorize a federal executive to detain anybody without common-law oversight and does not allow Congress to suspend common-law habeas corpus except during invasion or insurrection, so no federal detention power should constitutionally exist beyond a court’s ability to issue common-law habeas corpus writs. Most

² Duker, 115; Church, 36.
³ The Declaration of Independence.
important, the “common law” against which U.S. statutory law should be judged has to be the Americanized common law, which primarily upheld the protection of individual liberty and the rejection of imperial and centralizing power.

In *Ex parte Bollman*, Marshall compellingly argued that the federal court system was not meant to have the expansive and organic common-law power of habeas corpus. Conservatives could further argue that federal habeas corpus powers should be subject to the doctrine of enumerated powers. Yet state courts originally had a very strong habeas power over federal detentions before that power became defanged in *Ableman* and *Tarble’s Case*. In discussing questions such as the Anti-Terrorism and Effective Death Penalty Act, the role of federal habeas corpus over federal detentions and immigration policy, and the federal judiciary’s authority over military detentions, even if the conservatives are correct that the Supreme Court and lower federal courts should enjoy no original jurisdiction over these detentions, they must also, to be consistent, champion the pre–Civil War convention whereby state courts did have the power to oversee these and any other federal detentions.

Liberals often find themselves arguing on the side of habeas tradition – even if the tradition is, as they say, an activist one – although their opponents can usually find a technical reason, grounded in the positive national law that they tend to favor, to reject a broad interpretation of habeas. But liberals correctly note that habeas corpus practice has always been shaped by judicial experimentation. Habeas liberals compellingly love to declare: “We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement.”

Yet this situation raises an important question: What constitutes illegal confinement? The conservatives often answer the question very narrowly, believing the “rule of law” to mean whatever the statutes say and whatever the police enforce. They can indeed fall back on the traditions of federalism that dominated prior to the Civil War, but even then they are caught in a trap of their own making. The recent controversies over federal habeas corpus for detainees held under federal authority in the war on terror demonstrate that tradition is not completely on their side. How many prison camps did the United States have in foreign lands before the Civil War? How many crimes were punishable by the federal government? The tradition of questioning detentions through habeas on the basis that the conviction itself emanated from an unjust statute has a precedent whose revival is worth considering. In *Ex parte Siebold*, the Court decided that persons imprisoned “upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by this court on habeas corpus,

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although it has no appellate jurisdiction by writ of error over the judgment.”

Examining certain aspects of the writ’s history, one can easily construct a very traditional rationale whereby the Writ should be used to free anyone who has been detained in defiance of the Constitution, which would include, for example, those punished under federal drug laws that have no basis in the Constitution.

Putting aside any court’s jurisdictional authority, the question of what makes a confinement illegal or in accordance with the “rule of law” raises some difficulties. Is the rule of law simply what Congress or a legislature claims it to be? Some conservatives would say that’s the case, except when they disagree with the Congress vehemently and find its edicts unjust. Is the rule of law served when the police serve a warrant and arrest someone on a drug charge, and put him in jail? Or is this official conduct precisely the type of executive detention that habeas corpus was “always meant” to remedy?

At best, habeas corpus is used to secure the liberty of a person whose liberty has been wrongly violated. As Rubin “Hurricane” Carter, the professional boxer framed for murder by dishonest police and sentenced to rot in prison by a compromised jury, put it, “The Writ of Habeas Corpus is not just a piece of paper, not just a quaint Latin phrase. It was the key to my freedom.”

Freedom is the key. Therefore, the executive state, to say nothing of the judicial and legislative state, cannot be trusted to guard that freedom unchecked. As Hamdi’s lawyer Frank Dunham said of Deputy Solicitor General Paul Clement, he is a worthy advocate who is able to make the unreasonable sound reasonable. But when you take his argument at its core, it is: “Trust us.” And who’s saying, “trust us”? The executive branch. And why do we have the great writ? We have the Great Writ because we didn’t trust the executive branch when we founded this government. That’s why the government saying ‘trust us’ is no excuse for taking away and driving a truck through the right of habeas corpus and the Fifth Amendment that “no many shall be deprived of liberty except upon due process of law…”

Oliver Wendell Holmes wrote in his dissent in Frank v. Magnum that “habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.” The structure to which he referred comprises the law’s formalities

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6 *Ex parte Siebold* 100 U.S. 371 (1879).
7 Under Article I, Section 8, there is no enumerated power for Congress to pass laws against drug manufacture or distribution. This is why alcohol prohibition required a constitutional amendment. As Justice Clarence Thomas points out in his dissent in *Gonzales v. Raich*, 545 U.S. 1 (2005), if the federal government can ban locally produced and used marijuana, we have abandoned any semblance of a government of enumerated powers.
9 Ball, 112.
10 237 U.S. 309 (1915).
and process, whereas the tissue is its essence. “The object of Law,” wrote Roscoe Pound, “is the administration of justice.” 11 A theory of justice is necessary to embark on any understanding of what habeas corpus should mean, if we are to go beyond the structure, isolate the tissue, and avoid turning habeas into an “empty shell.”

The principle at the nub of all the habeas discourse – the principle that animates lawyers, excites scholars, and frustrates law-and-order enthusiasts – is the principle of individual liberty, along with the principle that the state can be wrong, the belief that it is wrong for the state to be wrong, and the belief that all wrongs, even those the state commits, ought to be remedied. Some might think that mention of this principle is trite, yet it is not. Morality is at the heart of the habeas discussion. As Paul D. Halliday remarks,

For millennia, judges and prisoners have understood that knowing the difference between right and wrong when ordering imprisonment is a legal imperative because it is a moral and spiritual imperative. 12

Many attempt to separate morality from the tale of habeas and to focus on the procedural question. L. W. Yackle writes, in a particularly compelling passage, about why habeas has become his passion in life:

I have devoted the lion’s share of my academic and professional attention to the writ of habeas corpus. I do not mind saying that I have been rewarded many times over. The writ has profound significance for individual liberty in the United States, for the rights that citizens may assert against governmental coercion, and for the institutional arrangements that form American constitutional democracy. The writ has been at the center of our efforts to define the role of the federal courts, to balance judicial, legislative, and executive power within the national government, and to orchestrate the relations between the national government and the states. No one who explores the writ’s rich history and studies its crucial modern functions can fail to appreciate this splendid, fluid, and dramatically effective instrument for holding governmental power in check. 13

This passage is a beautiful statement, but notice that Yackle finds it necessary to discuss the “balance” of “judicial, legislative, and executive power” and “the relations between the national government and the states.” Such considerations doubtless become important in efforts of seeking justice within a statist world. They are necessary in conceiving of a framework of governmental law most likely to produce just results. But these considerations are secondary to the purpose most people like to ascribe to habeas corpus – establishing justice and protecting liberty. The primary


12 Halliday, 1.

value of “the rights that citizens may assert against governmental coercion” prompts society to value processes for “holding governmental power in check.”

Indeed, without rights, who cares which judge does what to which custodian? If flesh-and-blood human beings were not at risk, all the questions of judicial activism or judicial restraint would seem academic at best, at least to those not wearing funny robes and wigs. As Joseph Marguiles, counsel in Rasul v. Bush, has said:

There was a very famous case called McCulloch versus Maryland, and one of the most famous lines... Justice Marshall, Chief Justice Marshall, he said, “This is a constitution. We must remember that this is a constitution we are expounding.” And law professors are fond of quoting that, this was sort of almost rabbinical authority, oh, this is a constitution we are expounding, as though just to say it – and students are supposed to stroke their chin knowingly, oh, yes; and no one really knows what it means. And I always tell my students to remember and not to get too wrapped up in the X versus Y, the issue, the case, to remember that this is a human being we are defending.

A human being stands at the center, a human being who is being detained wrongly, and if he is being detained wrongly, that detention is wrong. A timeless principle – a principle that transcends legal decisions, dissents, and seven hundred years of judges fighting among one another – is the most important matter here. Only through trial and error and attempts to find justice amid human imperfections have judges developed habeas corpus as a fundamental remedy for a terrible, recurrent government violation of human rights.

Therefore, the conservatives do not defend tradition as much as they believe. Habeas corpus, at its best, was always subversive judicial activism – that itself is its extraordinary tradition – but its most valuable purpose long ago rose far above either statutory law or any single judicial decision or common practice. The principle that it is wrong to detain people without proper cause in violation of their right to liberty, that it is an immoral act a free people cannot tolerate, may not predate habeas corpus, but it is nevertheless all important – a principle that people should respect even in a world without habeas as a mechanism for its enforcement.

In defending executive detention powers, unencumbered by meddling courts, many conservatives fall back on a conception of the “rule of law.” Yet constitutional language is not as unambiguous as they have it. When it demands that “Congress shall make no law... abridging the freedom of speech,” questions arise as to whether this precludes censorship of airwaves or other expression, whether it binds the states or the presidency, whether it applies to political candidates or pornography or libel or copyright. A rule of law cannot rest only on politicians’ pronouncements or the

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words written in statutes or court decisions, themselves drafted by men; that is still a

It is actually a positivist, utilitarian distortion of the traditional values that conserva-
tives profess to hold when they defer not to the cause of individual justice but
to the interests of social order or to words written in the statute books. Under the
unchanging natural law – God’s law or nature’s laws – what the police say, what
the legislature has done, or how long the state has punished people in a certain
way should not matter.\footnote{For an overview of how natural law in fact underlies the Western legal system, see Heinrich A. Rommen, \textit{The Natural Law} (Indianapolis: Liberty Fund, 1998). } It is irrelevant that slavery persisted for centuries; it was
wrong then and always will be wrong, even if habeas was legally recognized as the
way to enforce this legal institution. It does not matter if Congress outlawed alcohol
during the 1920s; if it is wrong to jail people now for drinking, it was always wrong.
Habeas corpus is properly conceived, at its most admirable utilization, as a judicial
instrument wielded by flawed human beings who attempt within their surrounding
structure to liberate unjustly locked-up humans through an approximation of natural
law, as best as it can be understood.

This conclusion will elicit objections from some habeas liberals. An assumption
prevails on the ideological left that rights are themselves social constructs, in some
sense granted by society if not the state itself. Society needs checks and balances for
the maintenance of justice, but justice itself is a common good, not rooted so much
in individual rights as in social harmony or utilitarian concerns. Rights come about
through cultural evolution; they were not simply “out there” awaiting our discovery.
However, even an evolutionary theory of morality presupposes progress from some
perspective. This is not to say all human history is a story of progress toward the ideal –
far from it – but the idea behind evolution of any kind assumes the development of
characteristics to better allow survival. Yet survival itself is something toward which
species evolve, in theory. So too can the natural law be something toward which
our understanding can evolve. Scholars have correctly noted that the writ predates
modern conceptions of rights against government interference, but it would be a
mistake to say that it predates rights themselves – just as it would be a mistake to say
slavery was not wrong before its wrongness was fully and widely acknowledged.

Once focus is restored to the moral principle of liberty, the procedural details of
habeas lose some of their importance. The writ is a government power and is not, \textit{in itself}, a natural right at all. As Murray Rothbard has argued, people do not have
a moral right to a specific set of due process protections; rather, they have a moral
right not to be aggressed against.\footnote{Murray N. Rothbard, \textit{The Ethics of Liberty} (Atlantic Highlands, NJ: Humanities Press, Inc., 1982), 243–4. } Procedural rights are not equivalent to natural
rights but only a means to protect them. As controversial as this claim may seem,
consider the following thought experiment:
What is more unjust, A or B?

A. A government official has a properly signed warrant to search the house of someone suspected of hiding a fugitive slave. The law he is enforcing is as constitutional as any, written directly in the Constitution itself. He goes through all the legally correction motions, captures the slave, and returns him to his master.

B. A government official without a warrant breaks into a house and finds a serial murderer on the verge of killing someone there. The officer arrests the killer.

The first example conforms to the “rule of law”; the second does not. Yet the first example is a clear case of government injustice, whereas the second is not so clear. Indeed, removing the governmental status from the actors’ identities sharpens the issue into focus: It is wrong for a police officer or a normal citizen to capture a slave and return him to his master; it is not so clearly wrong for anyone to break into the house to stop a murderer about to kill again.

The idea that it is worse to detain someone who is innocent, regardless of the processes used, than to detain someone clearly guilty of an actual violent crime, even when due process might have been compromised, is fairly understandable. It is this fact that gives any credence to Sandra O’Connor’s argument in Murray v. Carrier that the Court needed an indication of “actual innocence” before it could overturn state proceedings.\(^\text{*18}\) It buttresses the argument given by habeas conservatives when they complain that guilty convicts use habeas corpus to question their convictions.\(^\text{*19}\) It also renders shocking Justice Blackmun’s conclusion in Rose v. Mitchell that the Supreme Court could not intervene “merely because we may deem the defendant innocent or guilty.”\(^\text{*20}\)

The reason to support due process, the requirement for warrants, the exclusionary rule, Miranda rights, checks and balances, federalism, or federal oversight of state courts – the reason to support having a robust habeas corpus regime – has nothing to do with a natural right that people possess to the mechanical process of a judge issuing a certain piece of paper on his behalf (provided he has exhausted all state remedies!). Due process considerations and checks and balances merely serve as a check on government power, because without them, the government will violate rights even more than it already does.

Why do government police need warrants? Because they cannot be trusted to act without restraint. And why not? Because they have power no one else has. And which power is that? The power to act in ways that would be considered illegal if anyone outside of government acted similarly. If a normal person stopped someone on the street, violently held him down, searched him and found an illegal gun or drugs, took him to a basement and locked him in a cage, that conduct would be


\(^{19}\) Henry J. Friendly, “Is Innocence Irrelevant? Collateral Attack on Criminal Judgments.”

considered criminal – acts of assault and kidnapping. If a police officer were to do the same things, so long as he possessed the right paperwork, he would simply be doing his job. And the reason to demand that paperwork is to limit the number of innocent victims of the police.

The state, or government in the modern form, is, as Albert Jay Nock characterized it, a “monopoly of crime.” The state can legally do what would be considered a crime if anyone else did it. This reality makes due process important. Government and one of its most awesome powers – imprisonment – cannot go unchecked. The only noble reason to care about habeas corpus is a concern for individual liberty.

All governments endanger freedom. The powerful modern state presents particular threats to freedom. Whereas habeas evolved in medieval England amidst a legal atmosphere of competing, overlapping, and concurrent jurisdictions and power centers, today’s states and certainly the American state represent a much more vertically integrated and even more monopolistic power structure. Habeas corpus has become nationalized so as no longer to serve as a meaningful decentralist check on the central state’s detention policies.

Bringing the analysis back to practical considerations, the role of habeas corpus in the early twenty-first century poses a challenge to those who wish to see the principles of individual liberty triumph over the modern criminal justice system and executive detention. The concrete reforms necessary to ensure an effective remedy to the vast reality of injustice have their grounding in precedent, but can only succeed in a culture that embraces the principle of liberty, not just the mechanics of the writ.

The Modern Detention State and the Future of the Writ

An’ for each unharmful, gentle soul misplaced inside a jail/
An’ we gazed upon the chimes of freedom flashing.¹
– Bob Dylan

Habeas corpus scholarship seldom delves deeply into the modern correctional system, yet the latter should weigh heavily in discussions of liberty and custody. The institutional nature of punishment has concerned habeas agitators for centuries, going back to the torturous conditions of English prisons, such as the plague afflicting inmates under Charles II and the jail fever in the Old Bailey that killed more than forty people in 1750.² Understanding the detention state is just as important in the twenty-first century.

Conservatives have noted habeas’s shift from a pre-trial to post-conviction remedy, arguing that the writ should traditionally not apply to convicted felons. Yet prisons themselves were virtually nonexistent in early America. From 1691 until 1771, New York colony generated only nineteen prison convictions. Debtors’ prison existed, but it would often only confine people to a certain part of town, and the punishment generally came with time limits. “The penitentiary system was basically a nineteenth-century invention,” explains Lawrence Friedman. Much of the prison system arose in the aftermath of slavery to handle freed slaves through an alternative form of oppression, criminalizing behavior such as “vagrancy.” As late as 1880, all of the prisons and reformatories in the United States held only about thirty thousand men and women.³ As for U.S. federal prisons, they did not even exist “until the latter half of the nineteenth century.”⁴

² Church, 15–16.
⁴ Federman, 25.
The institutional links between slavery and modern mass imprisonment warrant special attention. States established correctional systems to keep freed blacks “in their place,” punishing them for violating black codes and vagrancy laws. The Thirteenth Amendment banned slavery and indentured servitude but made an exception: “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” By “duly convicting” blacks and then others under the criminal code, the states could still employ forced labor – so long as the master was now the government and not a private party. The criminal justice system came of age in the Progressive Era, with the new emphasis on reforming the individual through parole, probation, and juvenile detention, as well as the advent of a new class of crimes, such as selling alcohol or heroin. Conservatives who protest that habeas did not originally apply to probation and parole, the application to which has indeed caused unforeseen clumsiness in habeas litigation, should acknowledge that these institutions did not arrive until the twentieth century.

At the dawn of this millennium, the U.S. detention state towered over all others in the world. In November 2006, a U.S. Justice Department report found that seven million Americans, or one out of every thirty-two adults, were in jail or prison, on parole, or probation. Of the total number of persons ensnared in the justice system, 2.2 million were inmates in jail or prison. The International Centre for Prison Studies at King’s College in London concluded that the United States had more people in jail or prison than any other nation. Second in line was China, with 1.5 million behind bars, and third was Russia, with 870,000.

Not only in absolute numbers but also in per capita terms, the United States became the largest warden on earth with 737 per 100,000 people incarcerated, compared to 611 in Russia. Most Western nations had a ratio about one-sixth this high. Ethan Nadelmann from the Drug Policy Alliance attributed much of the problem to the war on drugs: “The United States has 5 percent of the world’s population and 25 percent of the world’s incarcerated population. We rank first in the world in locking up our fellow citizens. . . . We now imprison more people for drug law violations than all of western Europe, with a much larger population, incarcerates for all offences.” This astonishingly large population kept under lock and key – as well as the approximately five million on parole and probation – represents one of the greatest complications to the notion of the modern United States as a free country.

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6 King and Hoffman, 155–7; see Chapter 8.

Yet habeas corpus has touched very little of this. In modern times, a very disproportionate number of successful federal habeas petitions concern the death penalty, a small albeit important element of the correctional system. Given the high stakes involved, it makes sense that the death penalty has garnered such focus. Habeas has played a key role in the DNA exoneration of innocents on death row.

Bill Kurtis, a former law-and-order enthusiast who became a prominent critic of the death penalty, identified a potential lopsidedness of this focus in a conference on the morality and reliability of execution as policy:

We’re talking about the death penalty. In many ways, it’s a red herring. Because, as long as we focus on the death penalty, it’s the tip of a big triangle. That triangle is the criminal justice system. It’s the same kind of trial, the same mistakes that are made in so-called lesser trials, that have given us two million population in the United States, largest in the world.

The dirty little secret of the legal profession and the criminal justice system is that we have to do something about that, too. And what I maintain – get rid of the death penalty so we don’t have to talk about it anymore, we stop focusing on it, and then let’s get to work on that.

It has been argued that the abolition of the death penalty would greatly ease the habeas burden on the judiciary. Yet modern reform proposals centering on the death penalty or habeas corpus, though doubtless crucial and worthy of attention, have sometimes overlooked the elephant in the room – the U.S. criminal justice system itself, which has grown into monstrosity.

As of the mid-1990s, only about 1 percent of federal habeas petitions have involved state death penalty cases, yet a disproportionate fraction of successful petitions – about 20 percent – involved the death penalty. In the twenty or so years before the Anti-Terrorism and Effective Death Penalty Act, between 40 to 50 percent of death penalty petitions were granted. All in all, however, almost two-thirds of federal habeas petitions were dismissed for procedural reasons, more than a third were dismissed on the merits, and of the remaining 2 percent, the vast majority were remanded to lower courts, with a minority leading to release.

Meanwhile, the increasingly burdensome habeas procedure has discouraged convicts from filing. In 1950, about forty petitions were filed for every ten thousand state prisoners. From 1962 to 1970, during Warren’s revolution of criminal justice procedure, the rate increased by more than a factor of ten, to more than five hundred

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9 In one high-profile example, habeas corpus eventually exonerated Paul Gregory House through DNA evidence after twenty years on death row (King and Hoffman, 140–4).
10 “The Death Penalty on Trial,” The Independent Institute, Oakland, CA, January 27, 2005.
petitions for every ten thousand state prisoners. From 1970 to 2006, the rate dropped all the way down to 150 petitions per ten thousand prisoners.  

Because of the exhaustion principle, federal habeas relief began taking five or ten years, and so any prison convictions shorter than this did not get relief. As Richard Posner has noted:

The practical effect of requiring the applicant for habeas corpus to exhaust his state remedies is often to deny him any remedy, since failure to exhaust in time, a common consequence of poor representation of criminal defendants (and no representation in most postconviction proceedings), will, through the doctrine of waiver, prevent the applicant from obtaining relief from the federal court.  

The federal habeas procedure has become even more time-consuming since the adoption of the Anti-Terrorism and Effective Death Penalty Act, which was intended to streamline the process. King and Hoffman sum up the modern situation:

For all but a very small proportion of the millions of those convicted of crime every year in the United States, the Great Writ is a pipe dream. It is available only to those prisoners whose prison sentences are so long that they are still in custody even after the state courts have finished reviewing, and rejecting, their constitutional claims. For everyone else, habeas provides no remedy at all.

UNCHECKED BRUTALITY

In addition to the sheer size of the criminal justice system untouched by habeas, the modern prison system has become increasingly known for staggering rates of violence and sexual abuse. In 2001, Human Rights Watch released a report on male prison rape in the United States. Among the findings:

A recent academic study of an entire state prison system found an extremely high rate of sexual abuse, including forced oral and anal intercourse. In 1996, the year before Nebraska correctional officials told Human Rights Watch that prisoner-on-prison sexual abuse was uncommon, Professor Cindy Struckman-Johnson and her colleagues published the results of a survey of state prison inmates there. They concluded that 22 percent of male inmates had been pressured or forced to have sexual contact against their will while incarcerated. Of these, over 50 percent had submitted to forced anal sex at least once. Extrapolating these findings to the national level would give a total of over 140,000 inmates who have been anally raped.

13 King and Hoffman, 69–70.
15 King and Hoffman, 80.
16 King and Hoffman, 75.
The condition of juveniles in detention has become especially tragic in the early twenty-first century. According to a Justice Department Report, a survey of “more than 9,000 young people in custody . . . found that 12 percent reported being sexually abused one or more times, mainly by staff members. Particularly alarming, the study found several juvenile facilities where 30 percent or more of the young people reported being raped. Some of the institutions with high rates of victimization were in Indiana, Maryland, North Carolina, Pennsylvania, and Texas.”

Whatever one thinks of prisoners, rape is not an appropriate punishment in a civil society, but that is precisely the punishment to which many criminals have effectively been sentenced. This includes many thousands who never committed a violent act against anyone but were condemned to a life of rape, violence, and totalitarian control because of victimless crimes, such as drug violations or illegal gun ownership.

Nor should the reality of prison torture be ignored. In April 2004, when the tamer photos of Abu Ghraib detainee abuse surfaced, and the broader torture scandal began to erupt, many conservatives minimized the torture, comparing it to hazing or even consensual sexual activity. Although such statements do not do justice to the situation – under post-9/11 U.S. detention policy, at least a hundred prisoners have been tortured to death – in another sense the Abu Ghraib photos should not have been so shocking. As Pierre Tristam commented,

Abu Ghraib was bad. Our domestic prison system is worse, from the unspoken torture of the solitary confinement of thousands . . . the stunning yet apathy inducing fact that 7.3 million Americans are in prison, on parole or under probation. It’s a $47 billion-a-year industry, the opposite of “corrections,” that exceeds China’s entire military budget. Can that many Americans be so disproportionately more lawless than any other people on earth? On its face, the answer is no. Americans aren’t. Their criminal justice system is – the same system, unique in the world, that imprisons 13 year olds for life, carries out executions by conveyor belt (an average of 60 a year since 2000) and turns petty marijuana inhalers into felons swelling prison cells and budget deficits.

Around the same time as the Abu Ghraib scandal in Iraq, tens of thousands of Americans found themselves detained in supermax prisons within the United States, where “cell extractions” had become a common form of discipline even for minor misbehavior. Lance Tapley described this procedure as used on a prisoner who endured it “up to five times a day”:

Five hollering guards wearing helmets and body armor charge into a cell. The pointman smashes a big shield into the prisoner, knocking him down. The others

The power to arrest has also become much more widely used in the modern United States. Arrests themselves were relatively uncommon in both England and early America. When hundreds were detained without just cause in medieval England, it was a scandal. In the early 2000s, authorities arrested millions of Americans every year. In simpler times, habeas champions touted, albeit hyperbolically, the writ’s ability to prevent someone from spending more than two nights in jail without cause. With more than a million arrests a year, this notion went from being idealistic to absurd. Nor could courts possibly scrutinize the convictions of a million prisoners with federal habeas corpus. If far fewer prisoners were involved, affording each of them the full smorgasbord of procedural rights might be conceivable.

There are others whose freedom against unjust detention has been inadequately addressed through the Great Writ. Although the prevalence of involuntary psychiatric commitment declined in the late twentieth century, those the state deemed mentally ill often fell through the cracks of due process. Federal legislation in 1949 allowed for detention of criminal suspects deemed incompetent to face trial.  

Aside


King and Hoffman, 25.
from submitting to the state’s therapeutic regimen, the forcibly committed found themselves with very few opportunities to secure their release other than through habeas corpus. Thomas Szasz called this remedy “especially inadequate for the indigent and the poorly educated” and particularly ill-suited “for deprivations of liberty at the hands of physicians and psychiatrists.” Szasz elaborated: “[B]ecause of a complex interplay of educational, legal, psychological, and socioeconomic reasons, most mental patients cannot avail themselves of this protection against false commitment. And even when they can, it is not an effective remedy.” While the balance of power between criminal detainees and the correctional system is skewed, “the psychiatric-legal match between patient-petitioner and psychiatrist-superintendent” is probably even worse.27

Mass imprisonment, mass arrests, involuntary commitments outside the rubric of law enforcement – if the Great Writ of Habeas Corpus at the beginning of a new millennium has proven powerless against these travesties of justice in the United States, then perhaps its significance was always exaggerated – or, alternatively, ignored in discussions covering a much narrower scope than warranted.

THE NARROW BOUNDARIES OF DISCUSSION

In recent years, much of the literature concerning habeas corpus has dealt with narrow questions and details surrounding the war-on-terror detention policies that took shape after 9/11. Aside from this matter, many of the reform proposals for federal habeas as it concerns the domestic justice system similarly focus on details – tweaking a doctrine, passing a statute, reinterpreting a modern trend in federal practice. Most reform proposals and legislative efforts have become a back and forth between those seeking as many safeguards as possible for convicts and those stressing finality, comity, federalism, and saving resources. Rarely, however, has habeas practice moved dramatically and quickly in one direction or another.

Starting in the early 1980s, the American Bar Association (ABA) began to push for federal habeas corpus reform. In 1989, a wide investigation and task force launched by the ABA’s Criminal Justice Section scrutinized federal habeas corpus death-penalty cases and made a few recommendations: death-row defendants should get adequate counsel who had a few years of experience with felony cases and the relevant court of appeals, a commitment should be made to the “total exhaustion rule,” and there should be a federal priority of reviewing neglected federal claims first.28 In response to the Anti-Terrorism and Effective Death Penalty Act, as well as other reforms that have limited federal habeas review, the ABA, after years of contemplating reform, called for a moratorium to capital punishment because of the new difficulties in challenging death sentences. Detainees claiming illegal convictions or sentences

The interests of justice and individual liberty, which habeas corpus has come to symbolize, and the interests of the state that detains and processes so many criminals, cannot always be balanced. Although many believe federal habeas corpus has broadened in the past century, at the same time it has paradoxically narrowed. Randy Hertz and James Liebman explain:

For over three decades, analyses of habeas corpus have tended to ask – and answer affirmatively – the question whether habeas corpus has expanded substantially over the course of American history. As shown above, both the question and answer are historically inaccurate. The more appropriate question is whether the reach and scope of federal court review as of right of the legality of custody under constitutional law has expanded. And the answer is that it has not done so.\(^{33}\) (Emphasis in original.)

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32 Steiker, 191.

33 Hertz and Liebman, 82.
In this light, restrictive measures such as the AEDPA narrowed the reach of habeas and certainly reduced the prisoners’ access to it on average. Indeed, these changes were logical consequences of the Great Writ’s nationalization, bureaucratization, and statutory codification. Every time a legislature took up the writ, whether by Parliament’s passage of the Habeas Corpus Act of 1679, the Constitutional Convention’s agreement on the Suspension Clause, or the Reconstruction Congress’s passage of the Habeas Corpus Act of 1867, the broadening of centralized habeas did not produce the anticipated victory for individual rights. Although the United States adopted federal habeas review for state prisoners, the number of state prisoners as well as federal prisoners grew steadily. The nationalization of power that accompanied the nationalization of habeas corpus in U.S. history was a chief culprit.

From alcohol prohibition and Japanese Internment to the war on drugs and the war on terror, national power resulted in wrongly detaining more people than ever before. If before federal habeas there were no federal prisons, it is unclear whether, on balance, the nationalization of law and justice has been a blessing for the individual detainee. Given the federal judiciary’s historical record – taking over review of state detentions, only to limit the review’s scope; usurping the state courts’ function in checking federal detention, only to defer to executive prerogative – it becomes difficult to argue that the nationalization of habeas has on balance served the interests of individual liberty.

A very large detention state cannot be meaningfully checked by habeas corpus. Most prisoners will never see the writ’s protection. However, focusing on the principles involved and the remedy can facilitate a new outlook appropriate to modern circumstances. Legal arguments exist to make habeas corpus more respected and effective than ever. If habeas corpus is ever to fulfill what has long been promised of it, society’s philosophical foundations must embrace legal arguments radically different from those that have prevailed as of this writing.

Habeas and Detention Reform: Substantive Rights

The first major change that must occur to meaningfully protect the rights of the detained is for the mass arrests to end. Initially, Americans can abolish victimless-crime laws. The government could cease detaining people who have committed no act of aggression against others’ person and property. The state can immediately free people who have violated drug laws, or stand accused of merely possessing illegal guns or committing crimes against the state, such as tax evasion, visa violations, and draft resistance. If not for victimless crime laws concerning sedition, peaceful religious practice, forced lending violations, and the flouting of price controls, it is unclear that habeas would have ever even become such an important matter in England.  

When the criminal justice system handled far fewer suspects, courts had some chance to question detention on the basis of victimless-crime laws, such as resisting tyrannical taxes, practicing religion freely, or helping slaves to escape. Habeas corpus long questioned the very morality of a law. The principle spelled out by St. Augustine that an “unjust law is no law at all” seems radical in modern America, but it is rooted deep in the tradition of Western legal thinking. “[T]he law may recognize as a right that which is not so in truth,” wrote John Salmond, “or may fail to recognize one which in truth exists. Hence we have to distinguish between rights in fact and rights in law, that is to say, between natural rights and legal rights.”

The very recognition that some laws punish acts that are malum en se (a violation of the natural law, such as murder) and others target acts that are malum prohibitum (a violation of a law that the legislature simply passed) demonstrates that the Western legal tradition is familiar with the distinction. Some acts are just wrong and therefore illegal. Others are illegal only because they were made illegal. This distinction raises the question of whether the latter should be illegal at all, and if not, whether it is wrong for the state to criminalize them – whether, in a sense, it is malum en se for the state to prohibit acts that are merely malum prohibitum. One way this principle can be and has been enforced is jury nullification, a traditional process whereby the jury judges not just the facts, but also the law of the case. The intimate relationship between jury nullification and the Great Writ as instruments to defend liberty traces back to Bushel’s Case in 1670, when jurors refused to legitimize the Quaker Act and were vindicated by habeas corpus. If this practice were restored, juries would be allowed to nullify unjust laws, just as they did to help escaped slaves, accused witches, and victims of alcohol prohibition.

If society embraces not just the mechanism of habeas corpus but the principles it encapsulates, it must recognize that habeas has become insufficient to achieve these principles in light of the modern detention state. Some scholars have noted habeas’s limits in this regard, proposing a greater emphasis on criminal justice reform or greater federal subsidies for public defenders. Those who believe in the moral, not just technical, element of habeas need to pursue even more fundamental reforms to attain the results that habeas demands but cannot achieve. Persons incarcerated for non-crimes should be freed. If the courts can handle the caseload, they should be allowed to free people who are not guilty, but they probably do not have the time to do so at this point. All executive officers with the proper jurisdiction – governors and presidents – could pardon unconditionally and release all prisoners who are behind bars solely for victimless crimes, and they are arguably morally bound to do so by the principles at the root of habeas corpus.

37 King and Hoffman, 100–1.
Conservatives who dislike this idea can accept at least one “rule of law” principle as it concerns the federal level. Petitioners could traditionally question the constitutionality of the statute that drove their prosecution. The U.S. federal system is supposedly one of enumerated powers. The Constitution expressly authorizes the punishment of a short list of crimes at the federal level – counterfeiting, piracy, treason, and not much else. Federal drug laws are unconstitutional: they violate the Tenth Amendment and lie beyond the scope of Congress’s enumerated powers to legislate in the first place. Anyone convicted on an unconstitutional federal law should be free to question the constitutionality of the relevant statute before a federal judge, who should order the prisoner discharged. One might argue that there are opportunities for such arguments at trial. But American political culture should become more dedicated to taking such questions seriously. For the sake of justice, prisoners ought to have more than one serious chance to question rigorously the law for whose violation they are being tried and punished.

MORAL INDIVIDUALISM AND PROCEDURAL RIGHTS

So long as the state monopolizes law and legal violence, severe problems will arise. Like all monopolies, the state has an institutional tendency to make judgments in its own favor. In the long term, people should question the modern institution of prison, a relatively recent development that would have likely horrified the Founding Fathers who had nothing quite like it in their midst. Those interested in justice and liberty should also consider methods of law enforcement and law protection that do not depend on the state’s vagaries. Individualism, the concept of looking at each person as an individual with rights and responsibilities, should guide each part of the process as much as is humanly possible.

The principles of liberty imply that every process in criminal justice warrants scrutiny, holding the enforcers of policy responsible, even personally liable, for crimes against the innocent. The mere act of detaining someone before prosecution should be more controversial. After all, pre-trial detention was an early focus of habeas corpus. When the innocent are wrongly jailed, they should be compensated and made whole. Police officers and judges should not be free to condemn the innocent to a jail cell, any more than anyone else in society should be free to lock people up in their basement. The same moral principles apply. To deny this claim is to assert that the state’s agents stand above the law they claim to enforce, in which

59 Friedman, 48–50, 77–82.
40 See Stringham, Anarchy and the Law.
41 Bruce Benson, The Enterprise of Law: Justice Without the State (San Francisco: Pacific Research Institute, 1990).
case due process becomes mere window dressing to serve as public-relations cover for an organization unbound by morality.

After all, judges are simply men and women in robes, whose orders are followed only because the political and legal culture leads people to believe their orders are worthy of enforcement and obedience. This reality deserves recognition. It was perhaps more acknowledged when law emerged in the West as a decentralized enterprise practiced by different, competing, and overlapping centers of authority. A judge has no more natural rights than any other person. His orders to free people, just as his orders to detain people, only come to life because of those who carry them out.

If the Supreme Court declares that a state-level official has wrongly detained a prisoner, what matters most to the prisoner is his liberty, regardless of where the liberating order originates. From an individualist perspective, federal courts that correctly question the immoral confinement of a prisoner occupy, to that extent, the moral high ground.

There are plausible concerns that federal courts enjoy too much power over state institutions. Maintaining federal review authority over state processes can be justified on the basis of individual liberty, but the perversities that have resulted from nationalization should inform habeas scholars of the problems with this approach. Even habeas enthusiasts have acknowledged the amount of wasteful litigation, more than 99 percent of it resulting in a denied petition. Some have urged more federal restraint, arguing that the mid-century civil rights and criminal justice revolution justified a more national approach than today, when the state courts mostly adhere to the same guidelines.42

The nationalization of habeas corpus may have shown promise as a bold check on state detentions, but each expansion of review came along with limitations. As early as the late nineteenth century, “while the scope of habeas corpus inquiry was being broadened in terms of the concept of ‘jurisdiction,’ deepened in terms of the nature of the hearing, and expanded to cover the nature as well as the validity of custody, the availability of the writ was being severely restricted from an entirely different direction – procedure.”43 The twentieth century saw liberal expansion of federal habeas over state detentions, followed by conservative retrenchment. Federal habeas has become an empty remedy for virtually all state noncapital prisoners, and due to structural limitations and the scope of the justice system, there is no way around this. As King and Hoffman conclude from the empirical data:

Federal habeas review for state noncapital prisoners has become, in essence, a lottery. This lottery, funded at great expense by taxpayers, is open almost exclusively to the small group of convicted felons who are sentenced to the longest prison terms. It is wholly incapable of producing any substantial increase in the enforcement of

42 King and Hoffman, 67–107.
43 “Extradition Habeas Corpus,” 84.
federal constitutional rights. Habeas simply does not matter enough to have any meaningful impact on the police, lawyers, and state judges who determine the course of state noncapital cases today – and it never will. (Emphasis in original.)

Moreover, nationalization has ultimately put the federal government in charge of determining the scope of habeas review of its own detentions. The scaling back of federal review over state detentions accompanied a general strengthening of state-level review and protections, rendering the federal review arguably redundant. For federal convicts, however, federal review is the only recourse, and so the parallel rollback of review has been more deleterious. King and Hoffman argue that “[t]he problem with Section 2255 review today is that it continues to be tied too closely to the wrong model of postconviction review – the federal review of state criminal judgments.”

Long ago, Congress and the judiciary placed limits on the federal courts’ review over state detentions, notably through the exhaustion principle. Soon enough this principle applied where it had not before – such as in extradition cases, which underscored the complications of marrying post–Civil War federalism and habeas corpus. Today, conservatives even wish to apply the exhaustion doctrine to federal executive detentions so as to shield presidential war power.

In regard to federal detentions, federal habeas corpus should face few, if any, limits. The Constitution does not empower the federal government to detain people for many reasons, and when dispute arises in regard to a federal detention, the judicial system should settle such a question. When the doctrine of enumerated powers restrained Congress and the president, judicial restraint might have made sense. Today, however, the federal government is a global empire, the largest government in the history of the planet. It detains people at home and it detains people abroad. So long as it does so, Congress should not reduce the federal courts’ jurisdiction over federal detentions in any way. It has the constitutional power to do so, but only insofar as it stays strictly within the bounds of its enumerated powers.

Even some who advocate the reduction of the federal courts’ habeas caseload as it concerns state convictions forcefully argue that scrutiny over federal detentions must be preserved. These 2255 and 2241 procedures are often the first and only chance for federal prisoners to raise claims regarding changes to the law after appeal or facts that were not in the trial record. Applications for 2255 review from federal detainees peaked at around 12,000 in 1995 but have fallen to around 6,000 annually in recent years. If this number still seems high, it should provoke a fresh debate on U.S. criminal law rather than cutting back the federal courts’ authority over federal convictions.

44 King and Hoffman, 68.
45 King and Hoffman, 114.
46 King and Hoffman, 113.
47 King and Hoffman, 113–18.
As for executive commitments abroad, where the U.S. detention power goes, so too should the judicial power follow it, in all cases. This principle has precedent in the English experience. As the British Empire spread around the world, the writ moved with it, despite many of the affected prisoners’ foreign status. As Paul Halliday has written,

The issue was not the prisoner’s status – British, Indian, or otherwise – but the jailer’s. Where that jailer was a franchise of the British king, justices of the Supreme Court of Calcutta, by virtue of their common law authority to use the king’s most sacred judicial instruments, might send the writ, regardless of who that prisoner was.\footnote{48}{Halliday, 285.}

Furthermore, any congressional interference with the federal judiciary’s authority over federal detentions should be considered a de facto unconstitutional suspension of habeas corpus. If in time of war Congress claims the existence of a “rebellion” or “insurrection” and therefore explicitly or implicitly suspends the writ, the Supreme Court should consider the question of whether the United States is in fact in a state of rebellion or insurrection and declare the congressional action unconstitutional if it finds that such a condition does not exist. Otherwise, the Suspension Clause fails to protect liberty, if it ever had that purpose.

If not for the stupendously large prison population, the justice system, and all the other matters of social policy in which the federal courts have intervened, these courts would have the necessary time and resources for their most important job: keeping the federal legislature and executive in check. As was said in \textit{Ex parte Milligan}, “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”\footnote{49}{71 U.S. 2 (1866).} The Constitution includes the right of all people not to be deprived of liberty, property, or life without due process. It gives no exceptions. Habeas corpus is the way to ensure due process applies in all cases of detention. If the United States goes abroad in search of monsters to detain, the U.S. court system should follow its every move, ensuring they are in fact monsters. In 1901, as Justice Harlan said in his dissent in \textit{Downes v. Bidwell}, the Constitution applies “to all peoples, whether of States or territories, who are subject to the authority of the United States.”\footnote{50}{182 U.S. 244, 380 (1901).} The centuries-long battle over habeas was largely a battle with an executive determined to send prisoners beyond the reach of the courts. Those committed to freedom dare not allow the executive to win this war.

The actual history of the nationalization of individual rights shows that the national government has hardly ushered in an era of humanity and liberalism in regard to the criminal justice system. Perhaps the federal judiciary itself should be little more
than the Supreme Court, with limited jurisdiction over purely federal questions, as it was at the birth of the American republic. Back then, however, state courts had more leeway. Either way, this speaks to one of the most important legal reforms if habeas corpus is ever to have teeth.

**JURISDICTIONAL RADICALISM AND HABEAS CORPUS**

**FEDERALISM**

Much of the modern literature written by habeas corpus advocates has involved a defense of federal habeas, whether used against federal executive detentions or state convictions. On both fronts, they have constructed arguments about what the reach of federal habeas corpus always was or was intended to be. In both areas, they are stuck in a bind as their conservative opponents raise internally valid counterarguments.

In regard to executive detentions, these advocates are stuck arguing that the common law of habeas corpus was and is a flexible writ, and that this writ is and should be flexibly empowered to the federal judiciary. However, to give such an adaptable power to the federal judiciary does not comport comfortably with a federal judiciary regulated by Congress, which, under the Constitution, can largely determine the jurisdiction of the federal courts and even abolish all of them except the Supreme Court. The only way to make sense of this is to recognize that the common-law habeas corpus protected by the Suspension Clause was exercised by the state court system. Although it is consistent with American common law to allow the state courts great leeway in overseeing federal executive detentions, including over aliens detained abroad – because the courts’ jurisdiction would be over the federal custodians rather than over the detainees themselves – it is much more difficult to argue that Congress cannot meddle with the federal judiciary’s habeas reach. Indeed, the Court in *Hamdi* and *Hamdan* essentially told the president and Congress to go about such detentions with statutory approval, at which point the Court would have less cause to intervene. When Congress and the president heeded this admonition, the Court issued its *Boumediene* decision, which the dissenters plausibly denounced as a “bait and switch” and an expansion of federal court power beyond its congressionally authorized jurisdiction.

In regard to state detentions, habeas liberals have argued that the federal judiciary always had habeas corpus authority. For example, Eric M. Freeman has constructed a somewhat novel argument that the Suspension Clause always intended to guarantee a powerful federal habeas corpus writ and that John Marshall incorrectly interpreted the Judiciary Act in *Ex parte Bollman* as precluding federal review of state detentions. In framing his argument, Freedman discusses the common law

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as a flexible institution that exists outside the state, finds problems with Marshall’s interpretation of the Judiciary Act’s language, mostly hinging on the location of a clause and the presence of punctuation, and arguing, as a constitutional matter, that “there is substantial reason to believe that if the statute had the restrictive effect Marshall claimed, it violated the Clause.”  

He presents an impressive case of how highly the Framers regarded the Great Writ and offers up early federal cases of habeas’s use to check state detentions, although all of these involved cases that directly pertained to federal policy.

Suppose that Congress had never created the federal judiciary, passed the Judiciary Act, and empowered the Supreme Court to issue habeas writs beyond what was needed to carry out its limited functions of original jurisdiction as prescribed by the Constitution. Would Congress’s \textit{inaction} constitute a violation of the Suspension Clause? We must recognize that the Suspension Clause did not empower anyone to issue habeas writs and that it most likely was an implicit grant to Congress to suspend habeas in limited circumstances. But how could it be suspended if there was no body authorized to grant writs in the first place? Freedman himself gives us the answer: “However odd the notion may appear to modern lawyers, contemporaries all assumed that the state courts would be able to issue writs of habeas corpus to release those in federal custody.”

Indeed, according to Steven Semeraro, Freedman’s historical evidence “strongly supports the traditional historical interpretations that he seeks to debunk. . . . Freedman cites many historical sources and then-existing policy considerations. But virtually all of the historical evidence appears to point quite strongly in the opposite direction” of his thesis. Everything he presents is completely harmonious with a narrative that emphasizes the reach of state habeas corpus as very broad and that of federal habeas corpus as extremely limited.

With the state courts already issuing the common law writ – an American version that never had the institutional limitations found in the English writ’s history of centralization and opportunism – the Suspension Clause at best merely guaranteed that Congress could not interfere with state issuance of habeas corpus, including to protect federal detainees.

In June 2007, Attorney General Alberto Gonzales elicited criticism for saying at a Senate hearing: “There is no express grant of habeas in the Constitution. There is a prohibition against taking it away.” Although Senator Arlen Specter (R–Pa.) found this statement absurd, as did most civil libertarians reacting to it, it has some truth. The common-law right of habeas corpus preceded the Constitution, and the

\begin{footnotes}
\footnote{Freedman, \textit{Habeas Corpus: Rethinking the Great Writ of Liberty}, 35, 37.}
\footnote{Freedman, \textit{Habeas Corpus: Rethinking the Great Writ of Liberty}, 18.}
\footnote{“Gonzales Says the Constitution Doesn’t Guarantee Habeas Corpus,” \textit{San Francisco Chronicle}, January 24, 2007.}
\end{footnotes}
Suspension Clause made it no more secure. At best, the Constitution provides a conditional restriction upon Congress’s power to take away something Americans already had.

If not for *Tarble’s Case*, if habeas corpus still primarily resided with the state courts, modern lawyers could much more easily reconcile the common-law reach of habeas corpus even over wartime detentions with Congress’s power over the federal courts. An actual “rebellenion” or “insurrection” would have to exist to justify Congress’s involvement in any way with this state judicial power, although this only stands as a reminder of the problems with the Suspension Clause.

Over the last half-century, the debates over “federalism” and habeas corpus have suffered from superficiality and confusion. To be sure, liberal federal habeas corpus activism presents problems for local authority and traditional federalism. Yet the real problem is the Great Writ’s nationalization in the first place. The most important move toward habeas corpus federalism, one consistent with American principles, individual liberty, and social peace, is to restore habeas corpus as it once was – a states’ right against federal detention power.

Conservatives truly interested in supporting federalism and originalism can and should support the reestablishment of state oversight of federal detentions. If they refuse to accept this restoration out of fear it would compromise presidential and military power, their true concern must not lie with traditional federalism, but rather with state detention power itself; they are using federalism as an excuse to advocate fewer rights for those caught up in the criminal justice system.

Liberals whose true interest concerns civil liberties should also get behind restoring state habeas corpus for federal prisoners. Proponents of a healthy federal habeas writ, however, tend to overlook the full value of the old order in which states checked federal detentions. Jonathan Hafetz, arguing in favor of original federal habeas jurisdiction, addresses the

> theory . . . that the Suspension Clause was designed to protect individuals against unlawful detention by federal officers through judicial action by state courts. Whether historically accurate, this theory confronts a problem created by later Supreme Court decisions . . . Reading the Suspension Clause as protecting only a state court remedy would create a legal void, denying habeas corpus to prisoners in federal custody and leaving executive detention by the U.S. government unchecked.56

But this void only exists because of those Supreme Court decisions in tension with a judicial interpretation that Hafetz concedes might be “historically accurate.” Far from common suggestions to rethink these Court decisions, the opposite prevails in the literature. One scholar enamored of habeas has said of *Tarble’s Case*, “Not until 1871 could it be said that this situation was rectified.”57 But if America’s loudest

57 Robert Walker, 111.
defenders of federal habeas refuse to reconsider *Tarble’s Case* out of fear it would interfere with federal power – such as the enforcement of federal taxation, the main rationale by which federal habeas corpus was first expanded over state authority via the Force Act in 1833 – then they are also revealing that their true bias is toward a robust federal government, which would explain their love of federal habeas corpus rather than individual liberties and due process.

To Freedmen’s credit, he believes the Suspension Clause was intended not just to grant the federal courts a broad federal writ but also to sustain the state courts’ power “to order the release on habeas corpus of both federal and state prisoners.”58 This view at least puts the idea of liberty above the idea of government power, whereas a view that only the national government should freely check both levels of detention is more suspect as the product of a bias for nationalism than one for liberty. But even Freeman seems content with the Suspension Clause itself, which he claims first gave Congress the power to suspend the privilege of the writ (as well as giving the federal courts the power to issue it). An interpretation more supportive of civil liberties would either hold that the Suspension Clause was a step backward, as the anti-Federalists feared, because it gave the federal government power over the state courts in their review of federal detentions, or that the Suspension Clause does not technically grant the power to suspend the privilege to anyone. After all, it merely says that Congress cannot suspend the privilege except under certain conditions – it does not explicitly give Congress the power to suspend the writ. Perhaps a new course of argument could stress that because Congress was never delegated with this power explicitly, the writ of habeas corpus is absolute.

Both conservatives who truly care about federalism as well as liberals who genuinely value personal liberties and the protections guaranteed in the Bill of Rights should support the seemingly radical program of restoring state habeas corpus powers over federal detention authority. The Supreme Court should overturn *Tarble’s Case* and *Ableman v. Booth*, which gutted the traditional power of state courts to question federal detention, or Congress should simply strip the federal judiciary of the power to interfere in any way with state habeas corpus for federal prisoners. Many social problems existed before these fateful decisions, but a giant prison-industrial complex and military empire did not count among them. Had the state courts enjoyed more respect, the federal government would have also faced more difficulty in enforcing slavery. Moreover, in that old regime local powers count constrain the national-security apparatus.

States-rights advocates have championed nullification and secession, but perhaps no tool in the federalism toolbox has been more forgotten or neglected than a state court’s power to bring federal detentions, even federal military detentions, under their scrutiny. Had the United States retained its earlier traditions of federalism but still waged a global war on terror – putting aside the near impossibility of a

pre-Lincolnian state’s having the features of today’s world empire – liberty would find better guardianship. A state court, using a long-arm statute and claiming personal jurisdiction over federal officials with installations in their jurisdiction, could extend habeas corpus protection to Guantánamo. It could undo stop-loss orders by scrutinizing the terms of inescapable military service through the logic of the Thirteenth Amendment, which banned involuntary servitude.

A federal and state judiciary checking the federal detention power could prevent the excesses associated with modern federal detentions. For detentions at the state level, state habeas review can be strengthened and federal review should remain an option so long as Americans live under a leviathan prison state largely brought on by federal intervention.59

Habeas corpus is a paradoxical bundle, both an exercise of state power and a limit upon it. There is room for debate about its technical and historical reaches, but people must decide which principle they admire more: the empowerment of the judiciary or the curtailment of the executive? The exercise of government power or its limitation? So long as there is unlimited government, the liberals will never have habeas corpus as they want it. So long as the United States possesses an imperial detention regime at home and abroad, conservatives will never have limited government constrained by anything resembling traditional conceptions of law.

THE POWER OF THE WRIT

Given the current political, social, and legal reality facing the United States, the previous reform proposals indeed seem fanciful. This only reinforces the point that habeas corpus, in practice, falls short of its idealized reputation. If we want liberty and to overturn unjust detentions, habeas corpus as currently practiced does not fit our needs.

In its classical role as a check on executive detentions, habeas corpus was never as effective as many of its champions would like to believe. In England, it had a very limited capacity in serving as a brake on detentions by the Privy Council. Even the 1679 Habeas Corpus Act failed to stop the king from detaining prisoners in some locations and for certain offenses beyond judicial scrutiny. And it ultimately failed to obstruct detentions ordered by Parliament. In American history, habeas corpus was ineffective for the duration of the Civil War and did not effectively stop the military commissions that continued during Reconstruction. In the

59 If the federal government returned exclusively to its enumerated constitutional functions, we might consider reining in the federal habeas corpus power. In the meantime, to please those attached to a selective federalism, perhaps the federal police should be barred from enforcing federal habeas corpus writs upon state custodians, with the caveat that respecting the basic foundations of moral law is a prerequisite to being a member in good standing with the Union. To balance out this “threat,” the right of secession could also be restored.
early 1870s, the most radical power against military detentions of some types – the authority held by state courts – became completely overturned. During World War II, habeas corpus did not meaningfully interfere with executive prerogative in the Nazi saboteurs cases or Japanese Internment. In the war on terror, habeas corpus reached the Guantánamo detainees after several Court decisions, but even in this area the federal judiciary finally caved in to executive prerogative. Even American citizen José Padilla never got his vindication in the Supreme Court, and the effective authority of presidents to indefinitely detain U.S. citizens captured on American soil, affirmed by the Fourth Circuit Court, has yet to be overturned. Meanwhile, most detainees in the war on terror – prisoners captured in Iraq and Afghanistan – never had their day in court, and have been released or not completely according to the logic of U.S. foreign policy, rather than judicial checks and balances.

The effective reach of habeas in the domestic criminal justice system does not fare much better. Post–Civil War federal court review over state detentions has hardly made a dent in the detention state. The exhaustion principle coupled with the huge expansion of the correctional system has blunted habeas as an effective remedy against criminal justice abuses.

There were “golden eras” of habeas corpus depending on how the question is approached. In England, habeas became very effective in freeing prisoners, although many classes of detainees never had a chance at relief. In the United States, habeas as a decentralist writ thrived from the colonial times to the mid-nineteenth century, with state review of federal detentions being energetic, although state processes also defended slavery. If federal review of state detentions is to be celebrated, there were times after the Civil War and in the 1960s when it appeared that habeas review would become increasingly broad.

But these are historical aberrations. At no time was habeas corpus effective in all relevant ways – as a decentralist check, as a curb on slavery and other major injustices, as a challenge to unjust laws, as an obstruction to grassroots tyranny, and as a genuine guardian against lawless pre-trial detentions, convictions, and executive commitment. For habeas corpus to actually become a remedy “efficacious . . . in all manners of illegal confinement,” as Blackstone called it, would require just the type of broad reform, even revolution – constitutional and judicial, as well as ideological on the part of society – that is previously outlined. Yet the short-term prospects of such reforms seem scant indeed.

Unfortunately, habeas corpus is a writ having at least as much to do with power as liberty. As an instrument of jurisdictional control developed by royal courts, it has reverted to such a centralizing device in the United States as well. At times, it has come to liberty’s rescue, but never in the wide-ranging ways discussed by its most optimistic advocates. When it is most needed, it is all too often helpless to intervene. If the Writ ever approaches its potential as a liberating remedy, nothing less than a societal shift toward the principles of individual freedom, one that permeates the
political and judicial arms of government, would suffice. So long as the emphasis is on power, and not liberty, habeas corpus will in many cases be nothing but the very “empty shell” that Oliver Wendell Holmes warned would become of legal proceedings without the writ. A society needs more than the judicial order to secure its freedom. It needs to value that freedom in itself.
APPENDIX A

Analysis of Hirabayashi v. United States

Much of the Court’s unanimous decision hinges on whether the president, Congress, and military commander General J. L. De Witt intended to make the curfew part of the law, rather than whether that law was constitutional. Writing for the Court, Stone cites a letter to the chairman of the House Military Affairs Committee, during deliberation on the bill passed in March 1942, informing him that “General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones.” He cites a warning from the chairman of the Senate Military Affairs Committee that “‘reasons for suspected widespread fifth-column activity among Japanese’ were to be found in the system of dual citizenship which Japan deemed applicable to American-born Japanese, and in the propaganda disseminated by Japanese, Buddhist priests and other leaders, among American-born children of Japanese.”

As for the constitutionality of the whole affair, Stone, citing former chief justice Charles Evans Hughes and a number of other cases, writes,

The war power of the national government is “the power to wage war successfully...” It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution

1 320 U.S. 81, 90–91 (1943).
2 Among other precedents for the broad powers at wartime, Judge Stone cites the Selective Draft Law Cases 245 U.S. 366. For a critique of the World War I judicial principle that since conscription, a severe limitation on personal liberty, was constitutional, so too must be practically any lesser violation of freedom—a precedent revitalized here during World War II—see Robert Higgs, “War and Leviathan in Twentieth-Century America: Conscription as the Keystone,” in The Costs of War: America’s Pyrrhic Victories, edited by John V. Denson (Auburn, AL: Ludwig von Mises Institute, 1999).
and progress of war. . . . Since the Constitution commits to the Executive and to Congress the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.³

Stone confronts the fact that “the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry” and asks “whether, in the light of all the facts and circumstances, there was any substantial basis” for fearing a Japanese invasion aided by Japanese-American U.S. citizens and faces the appellant’s claim that if some citizens are retrained by curfew, so should all citizens in the area be.⁴ He notes that “[t]here is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.”⁵

In defending the curfew as policy, Stone muses that “[i]t is an obvious protection against the perpetration of sabotage” and “an appropriate exercise of the war power [whose] validity is not impaired because it has restricted the citizen’s liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty.”⁶

As for racial discrimination, Stone notes that the Fifth Amendment contains no equal protection clause and “restrains only such discriminatory legislation by Congress as amounts to a denial of due process.” In most cases, governmental racial discrimination is illegal, but in this case, its importance justifies it: “Because racial discriminations are in most circumstances irrelevant, and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war.” He then invokes the famous quote from John Marshall’s decision in McCulloch v. Maryland (1819), whose implications are so potentially broad as to render the principle equally valid in defending literally anything the government might wish to do: “We must never forget that it is a constitution we are expounding.”⁷ He further uses a version of the “living Constitution” argument to strengthen his point: “The Constitution, as a continuously operating charter of government, does not demand the impossible or the impractical.”⁸

³ 320 U.S. 81, 90–93.
⁴ 320 U.S. 81, 90–95.
⁵ 320 U.S. 81, 96.
⁶ 320 U.S. 81, 99.
⁷ 320 U.S. 81, 100.
⁸ 320 U.S. 81, 104.
Appendix A: Analysis of Hirabayashi v. United States

Stone does not address the challenge to the first count of Hirabayashi’s indictment, which charged him with failure to report to a Civilian Control Station. Having found that the second count that he failed to obey the curfew order “is without constitutional infirmity,” Stone concludes the Court “has no occasion to review the conviction on the first count since . . . the sentences on the two counts are to run concurrently, and conviction on the second is sufficient to sustain the sentence. For this reason also, it is unnecessary to consider the Government’s argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.”

Justice Douglas’s concurring opinion even more lavishly praises military law. He writes,

If the military were right in their belief that, among citizens of Japanese ancestry, there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency. We must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties. We cannot possibly know all the facts which lay behind that decision. . . . Nor are we warranted, where national survival is at stake, in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty. . . . Peacetime procedures do not necessarily fit wartime needs. It is said that, if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the number of those who are finally shown to be disloyal or suspect is reduced to a small percent.

Douglas differentiates himself from Stone on the point about “assimilation,” averring, “it is important to emphasize that we are dealing here with a problem of loyalty, not assimilation. Loyalty is a matter of mind and of heart, not of race. That indeed is the history of America.” So perhaps Hirabayashi was truly loyal, but he was still legally required to follow orders, no less than a “conscientious objector” who “has no privilege to defy the Selective Service Act.”

Justice Murphy concurred as well, but cautioned about the broader principles of executive power implied in Stone’s decision:

It does not follow . . . that the broad guarantees of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. . . . We give great deference to the judgment of the Congress and of the military authorities as to what is necessary

9 320 U.S. 81, 105.
10 320 U.S. 81, 106 (Douglas concurring).
11 320 U.S. 81, 107 (Douglas concurring).
12 320 U.S. 81, 109 (Douglas concurring).
in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war (see Ex parte Quirin, 317 U. S. 1) could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law.\footnote{320 U.S. 81, 110 (Murphy concurring).}

As for the racial question, Murphy insists that “[t]o say any group cannot be assimilated is to admit that the great American experiment has failed.” Moreover, whereas he agrees with the Court in upholding the curfew conviction, he explains ominously why “this goes to the very brink of constitutional power”:

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged, no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense, it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour – to sanction discrimination between groups of United States citizens on the basis of ancestry [emphasis added].

Murphy further warns his fellow justices that the duty of ensuring the government obeys the Constitution “exists in time of war as well as in time of peace” and that it “must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.”\footnote{320 U.S. 81, 113 (Murphy concurring).}

Justice Rutledge, in his one-paragraph concurrence, also cautions against the possible interpretation of the decision

that the courts have no power to review any action a military officer may “in his discretion” find it necessary to take with respect to civilian citizens in military areas or zones, once it is found that an emergency has created the conditions requiring

\footnote{Of course, between the restrictions put on Japanese-Americans and those put on European Jews, many would say there is no comparison. But it is important to recognize that the limits placed on the Jewish population under Nazi control began relatively modestly, progressed onto concentration camps, and then only later culminated in the mass murder of millions that starkly defined the Final Solution. We should understand that the evils of the Holocaust were far greater than those of Japanese Internment, but also that the evils of the Holocaust at its peak were far greater than the early mistreatment of the Jews under Hitler. The point is to be on guard at the earliest sign of significant oppression, for genocide as such rarely comes all of a sudden, and wartime is indeed the most dangerous of times for the civil liberties of oppressed populations.}
or justifying the creation of the area or zone and the institution of some degree of military control short of suspending habeas corpus... The officer, of course, must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen.\(^{15}\)

\(^{15}\) 320 U.S. 81, 114 (Rutledge concurring).
APPENDIX B

Analysis of Korematsu v. United States

Justice Hugo Black, writing for the Court to uphold the Japanese Internment program, warns that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”

He begins by drawing parallels with the Hirabayashi case, pointing out that both the curfew order and the exclusion order were “promulgated pursuant to Executive 9066.” He reminds us that Congress’s delegation of power to the executive via its 1942 Act was questioned under Hirabayashi, and in that case, the Court “upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.”

In defending the military exclusion order, Black says that “[t]he military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion.” He says “the assumptions upon which we rested our conclusions in the Hirabayashi case” are the very principles being challenged by Korematsu.

As with Hirabayashi, much of the reasoning depends on the threat to America from Japan and the nature of Japanese-Americans. Although “we have no doubt [that most Japanese-Americans] were loyal to this country,” the exclusion had not been “group punishment based on antagonism of those of Japanese origin.” To buttress the case for exclusion, Black notes that “[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.” Presumably, the refusal to swear a loyalty

1 323 U.S. 214, 216 (1944).
2 323, U.S. 214, 217.
3 323 U.S. 214, 218.
oath to the government rounding up people of your national heritage to put in concentration camps, and your desire to leave, deserve suspicion.

He continues, defending Japanese Internment by contrasting it to the situation in Germany:

It is said we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. . . . Regardless of the true nature of the assembly and relocation centers – and we deem it unjustifiable to call them concentration camps, with all the ugly connotations that term implies – we are dealing specifically with nothing but an exclusion order. . . . Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire. . . . There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that, at that time, these actions were unjustified.  

Justice Frankfurter’s concurring opinion interestingly argues, in essence, that the very idea of curbing broad executive wartime powers is absurd on its face:

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. . . . [T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as “an unconstitutional order” is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are, of course, very different. But, within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. . . . To recognize that military orders are “reasonably expedient military precautions” in time of war, and yet to deny them constitutional legitimacy, makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war.

The Framers indeed had actual experience with war. They also knew the violations of liberty that the British Empire conducted in the name of war and national security. Indeed, with the lone exception of the Third Amendment, the Bill of Rights makes no exemptions for wartime, implying that the Framers had no intention to have most of the remaining constitutional restrictions on government power only stand strong during peace.

Frankfurter continues:

If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. . . . To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.\(^5\)

There were three dissents from this decision, each of which raises crucial points.

Justice Roberts writes that “the indisputable facts exhibit a clear violation of Constitutional rights.” Far from simply “keeping people off the streets at night,” as the curfew order had, this case concerns “convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.”\(^6\)

Tracing the timeline of events surrounding the military orders springing from Executive Order 9066, Roberts contends that Korematsu found himself in a Catch-22:

The predicament in which the petitioner . . . found himself was this: he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt’s report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document – and, in the light of the above recitation, I think it is not, – that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.\(^7\)

Black writes in his decision that Korematsu’s dilemma was surmountable, since the first order on March 27, 1942, had language in it that meant its “effect was specifically limited in time ‘until and to the extent that a future proclamation or order should so permit or direct.’”\(^8\)

In response to this objection, Roberts urges the recognition that the fate Korematsu was trying to avoid, for which he was convicted for his lawbreaking, was itself

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\(^5\) 323 U.S. 214, 224–5 (Frankfurter concurring).

\(^6\) 323 U.S. 214, 226 (Roberts dissenting).

\(^7\) 323 U.S. 214, 229 (Roberts dissenting).

\(^8\) 323 U.S. 214, 220.
detention. The exclusion order was not a safety measure on par with the curfew or preventing citizens from entering a danger zone. Rather,

the exclusion was but part of an over-all plan for forcible detention. . . . The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave. . . . We cannot shut our eyes to the fact that, had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived, he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. . . . These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo case, supra. The answer, of course, is that, where he was subject to two conflicting laws, he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Justice Murphy’s dissent hinges on the notion that something as extreme and racially discriminatory as Japanese Internment is unconstitutional “in the absence of martial law . . . . Such exclusion goes over ‘the very brink of constitutional power’ [which was how Murphy had described the situation in Hirabayashi] and falls into the ugly abyss of racism.”

Murphy confronts the very basis of Japanese Internment as a reasonable response to the threat from Japan. He cites the Commanding General’s Final Report on the Pacific area Evacuation, finding fault with the broad brush used:

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt, rather than bona fide military necessity is evidenced by the Commanding General’s Final Report on the evacuation from the Pacific Coast area. . . . In it, he refers to all individuals of Japanese descent as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies . . . at large today” along the Pacific Coast . . . . In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, [Footnote 3/3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise, by their behavior, furnished reasonable ground for their exclusion as a group.

9 323 U.S. 214, 233 (Roberts dissenting).
10 According to Louis Fisher, Justice Department officials knew during the Korematsu deliberations that the report had errors regarding espionage claims. The FBI and FCC had disproved claims that signals had been sent to help the Japanese conduct submarine attacks. This was whitewashed in the Justice Department brief in Korematsu. Fisher, 143.
Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be “a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion. . . .” They are claimed to be given to “emperor worshipping ceremonies,” . . . and to “dual citizenship.” [Footnote 3/6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty. . . together with facts as to certain persons being educated and residing at length in Japan. [Footnote 3/8] It is intimated that many of these individuals deliberately resided “adjacent to strategic points,” thus enabling them “to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so.”

Murphy finds that the “main reasons relied upon” for Japanese evacuation have little to do with “the dangers of invasion, sabotage and espionage” but are instead “largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese-Americans by people with racial and economic prejudices – the same people who have been among the foremost advocates of the evacuation.” Moreover, “[a] military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations.”

In response to the notion that decisions had to be made quickly, Murphy notes that “nearly four months” passed after Pearl Harbor before the first exclusion order, musing that “[l]eisure and deliberation seem to have been more of the essence than speed.” What’s more, “not one person of Japanese ancestry was accused or convicted of espionage after Pearl Harbor while they were still free.” He concludes by pointing out that many of the 112,000 detained persons are elderly and children, and condemns the “legalization of racism” which he finds “utterly revolting” in a Constitutional Republic. 11

Justice Jackson also dissented, pointing out that Korematsu was unquestioned in his loyalty to America and not guilty of any traditional crime. The only way he could have avoided breaking the law would have been “submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.” As for the fact that Korematsu was of Japanese ancestry, Jackson concludes that punishing him on this basis would violate the Constitution.

Even if all of one’s antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that “no attainder of treason shall work corruption of blood, or forfeiture except during the life of the

11 323 U.S. 214, 242 (Murphy dissenting).
person attainted.” But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.12

Jackson further argues that just because a military operation is strategically sound does not mean it is constitutional. It is up to the courts, not the military, to decide questions of the law, just as it is up to the military, not the courts, to decide military strategy. This decision, however, is even worse than the potentially illegal military action all by itself, because

[a] military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.13

Jackson takes issue with what he perceives to be a bait and switch concerning this case and Hirabayashi. In the latter case, the Court was “urged to consider only the curfew featured, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi’s conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language.”14 But in Korematsu, The Court is now saying that, in Hirabayashi, we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely, and if that, we are told they may also be taken into custody for deportation, and, if that, it is argued, they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.15

Jackson concludes:

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

12 323 U.S. 214, 243 (Jackson dissenting).
13 323 U.S. 214, 246 (Jackson dissenting).
14 323 U.S. 214, 246 (Jackson dissenting).
15 323 U.S. 214, 247 (Jackson dissenting).
Of course, the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive... 

My duties as a justice, as I see them, do not require me to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.
APPENDIX C

Analysis of *Ex parte Endo*

Writing for the Court’s affirmation of habeas rights in the case of an interned American citizen, Justice Douglas notes that the War Relocation Authority, created as a civilian executive office created out of Roosevelt’s Executive Order 9066 on March 18, 1942, had three purposes: “(1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal from disloyal evacuees; (3) the continued detention of the disloyal, and, so far as possible, the relocation of the loyal in selected communities.” The third part, Douglas explains, involves an application process that Endo satisfied, and she was accordingly granted leave clearance on August 16, 1943, after her habeas corpus petition, indicating government agreement that she was a “loyal and law-abiding citizen of the United States.”

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge, or that she is even suspected of disloyalty. Moreover, they do not contend that she may be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been granted is an essential step in the evacuation program.1

The main reason for her continued detention despite the previous reasons was a practical consideration, summed up by General De Witt in a report to the Chief of Staff that “the interior states would not accept an uncontrolled Japanese migration.”2 Douglas responds to the argument that there “might have been a dangerously

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2 323 U.S. 283, 296.
disorderly migration of unwanted people to unprepared communities” if the government could not continue to detain people cleared as loyal citizens until it could find a place to put them. He argues this does not excuse Endo’s continued detention. First of all, “Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military... [N]o questions of military law are involved.” Thus, there need not be any deference to the military’s broad war powers.

“We must assume,” writes Douglas, “when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.” In looking at the legislative history of the March 21, 1942, congressional ratification of Roosevelt’s Executive Order 9066, Douglas contends that “[t]heir single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.”

Although “we may assume for the purposes of this case that initial detention in Relocation Centers was authorized,” the “silence of the legislative history” on detention means that “any such implied power must be narrowly confined to the precise purpose of the evacuation program. A citizen who is concededly loyal presents no problem of espionage or sabotage.”

The “lawful character” of the evacuation program was as “an espionage and sabotage measure, not that there was community hostility to this group of American citizens.”

To believe that Congress and the president intended to continue detaining Endo in this case “would be to assume that [they] intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country.” Roosevelt’s own rhetoric and constitutional principles preclude such an interpretation, and so “Mitsuyu Endo is entitled to an unconditional release by the War Relocation Authority.”

Also with important implications for habeas corpus jurisprudence, Douglas considers “whether the District Court has jurisdiction to grant the writ of habeas corpus because of the fact that, while the case was pending in the Circuit Court of Appeals, appellant was moved from the Tule Lake Relocation Center in the Northern District of California, where she was originally detained, to the Central Utah Relocation Center in a different district and circuit.”

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4 323 U.S. 283, 298.
5 323 U.S. 283, 300.
6 323 U.S. 283, 301–2.
7 323 U.S. 283, 302.
9 323 U.S. 283, 304.
Appendix C: Analysis of Ex parte Endo

Douglas notes that her transfer had nothing to do with the habeas corpus proceedings, but “was part of a general segregation program.” He writes that there is no need to rule on whether her presence in the district is required for jurisdiction because she was there at the time of petitioning for the writ, and her custodian still remains within the District Court’s jurisdiction. Specifically, “if the writ issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the corpus of appellant will be produced, and the court’s order complied with in all respects.”10 Because her custodian, the person holding her, is still within the District Court’s reach, the court still has jurisdiction of her case and should grant her writ. Thus, “the judgment is reversed, and the cause is remanded to the District Court for proceedings in conformity with this opinion.”11

Justice Murphy concurred with the opinion, but gave some more radical remarks bringing the whole program into question, as he had in his dissent in Korematsu: “I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive, but is another example of the unconstitutional resort to racism inherent in the entire evacuation program.” He also stresses that if Endo is in fact entitled to “unconditional release,” that would “necessarily impl[y] ‘the right to pass freely from state to state,’ including the right to move freely into California,” where she was from.12

Also concurring with the result of the decision, Justice Roberts was even more adamant that he could “not agree with the reasons stated in the opinion of the court for reaching that result.”13

In particular, he takes issue with the majority’s insistence that the president would never dream of this particular injustice taking place and that it must be assumed the government had no intention of stripping American citizens of their rights on the basis of race unless absolutely necessary for national survival, and only insofar as it was necessary. Specifically, he believes the blame for Endo’s mistreatment cannot fall solely on lower officials in the executive, but must instead rise higher up:

As the opinion discloses, the executive branch of the Government not only was aware of what was being done, but, in fact, that which was done was formulated in regulations and in a so-called handbook open to the public. . . . I think it inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case. Such a basis of decision will render easy the evasion of law and the violation of constitutional rights, for when conduct is called in question the obvious response will be that, however much the superior executive officials knew, understood, and approved the conduct of their subordinates, those subordinates in fact lacked a definite mandate so to act. It is to hide one’s head in

12 323 U.S. 283, 307–8 (Murphy concurring).
13 323 U.S. 283, 308 (Roberts concurring).
the sand to assert that the detention of relator resulted from an excess of authority by subordinate officials.

Although “the Act of March 21, 1942, said nothing of detention or imprisonment, nor did Executive Order No. 9066, of date February 19, 1942,” Roberts could “not agree that, when Congress made appropriations to the Relocation Authority, having before it the reports, the testimony at committee hearings, and the full details of the procedure of the Relocation Authority was exposed in Government publications, these appropriations were not a ratification and an authorization of what was being done.”

Therefore, while refusing to defend the goodwill of Congress and FDR and agreeing with the majority opinion implying that the federal government never intended things to go so far, Roberts focuses on

a serious constitutional question – whether the relator’s detention violated the guarantees of the Bill of Rights of the federal Constitution, and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution, she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.14

14 323 U.S. 283, 310 (Roberts concurring).
APPENDIX D

Analysis of Rumsfeld v. Padilla

In the case of Padilla, the Supreme Court offered a lesson as to how jurisdictional technicalities can overtake the greater issues at hand. Chief Justice Rehnquist delivered the Court’s opinion, joined by Justices Scalia, Kennedy, and Thomas. Kennedy and O’Connor gave a concurring opinion, and Stevens, joined by Souter, Ginsburg, and Breyer – the four left-liberals on the Court – dissented.

The Court determined that the lower court lacked the jurisdiction over Padilla’s habeas petition. Specifically, because Commander Melanie Marr was the only proper respondent, and the District Court had no proper authority over her, the decision was reversed and remanded back to the Appeals Court. Citing the U.S. statutory habeas law, Rehnquist argues,

The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is ‘the person who has custody over [the petitioner].” 28 U.S.C. § 2242; see also § 2243 (“The writ, or order to show cause shall be directed to the person having custody of the person detained”). The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner’s habeas petition (emphasis added).

Therefore, the “the proper respondent is Commander Marr, not Secretary Rumsfeld.” So it comes down to a “definite article” – only one person, supposedly, could be the primary custodian.

3 542 U.S. 426, 426.
4 Interestingly, Rehnquist writes in a footnote that this is not always the case: “We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court.” Ibid., note 9. This gives a glimpse into a world where the ancient and powerful writ of habeas corpus can become enervated under a fickle judicial construction that allows for some exceptions, but for some reason, holds fast in rejecting all others.
The dissenting opinion in *Padilla* argues that habeas corpus is not to be construed so narrowly. Indeed, under American legal traditions, habeas corpus does not even apply only to those under physical confinement. \(^5\) Rehnquist, in echoing another court decision, calls this argument a “non-sequitur”: Just because the Court’s “understanding of custody has broadened to include restraints short of physical confinement does nothing to undermine the rationale or statutory foundation of [the] immediate custodian rule where physical custody is at issue.” \(^6\)

While there is legal precedent for habeas corpus to apply even once the detainee has been moved, \(^7\) Rehnquist argues that this only applies “when the Government moves a habeas petitioner after she properly files a petition naming her custodian. . . . Padilla [in contrast] was moved from New York to South Carolina before his lawyer filed a habeas petition on his behalf. . . . [T]he Southern District never acquired jurisdiction over Padilla’s petition.” \(^8\)

Once it was argued that Marr was the only proper respondent, the Court addressed the question as to whether the District Court could issue writs to respondents not in their jurisdiction. Rehnquist argues that

Congress added the limiting clause – “within their respective jurisdictions” – to the habeas statute in 1867 to avert the “inconvenient [and] potentially embarrassing” possibility that “every judge anywhere [could] issue the Great Writ on behalf of applicants far distant from the courts whereon they sat.” . . . Accordingly, with respect to habeas petitions “[d]esigned to relieve an individual from oppressive confinement,” the traditional rule has always been that the Great Writ is “issuable only in the district of confinement.” \(^9\)

Rehnquist also argues that before changes were made to the law, federal prisoners wishing to challenge their convictions “could litigate such collateral attacks only in the district of confinement,” \(^10\) bolstering his argument that the standard process should be limited to within the issuing court’s district.

While the dissent cites *Braden v. 30th Judicial Circuit Court of Kentucky* \(^11\) as precedent for allowing district courts to issue writs on behalf of detainees outside their jurisdiction, Rehnquist emphasizes that the writ can only be issued if the custodian is within its jurisdiction. \(^12\)

The dissenting opinion by Stevens argues that:

It is reasonable to assume that if the Government had given Newman, who was then representing respondent in an adversary proceeding, notice of its intent to ask

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\(^5\) Duker, 293–4.

\(^6\) 542 U.S. 426.

\(^7\) *Ex parte Endo*, 323 U.S. 283 (1944).

\(^8\) 542 U.S. 426, 441 (2004).


\(^10\) 542 U.S. 426, 443.


\(^12\) 542 U.S. 426, 444 (2004).
the District Court to vacate the outstanding material witness warrant and transfer custody to the Department of Defense, Newman would have filed the habeas petition then and there, rather than waiting two days. Under that scenario, respondent’s immediate custodian would then have been physically present in the Southern District of New York carrying out orders for the Secretary of Defense. Surely at that time Secretary Rumsfeld, rather than the lesser official who placed the handcuffs on the petitioner, would have been the proper person to name as a respondent to that petition.13

Here we see an appeal to basic fairness. But in response to Stevens’s protest that the Government “‘depart[ed] from the time-honored practice of giving one’s adversary fair notice of an intent to present an important motion to the court,’ when on June 9 it moved Ex parte to vacate the material witness warrant and allegedly failed to immediately inform counsel of its intent to transfer Padilla to military custody in South Carolina,” Rehnquist simply argues that “[t]he dissent cites no authority” for “treating the habeas application as the functional equivalent of one filed two days earlier.”14

In his concurring opinion, Justice Kennedy, joined by O’Connor, agrees that “the habeas action must be brought against the immediate custodian” and that “when an action is brought in the district court, it must be filed in the district court whose territorial jurisdiction includes the place where the custodian is located.”15 As for the specific reason that the district court in question lacked jurisdiction, Kennedy “would not decide today whether these habeas rules function more like rules of personal jurisdiction or rules of venue. It is difficult to describe the precise nature of these restrictions on the filing of habeas petitions.”16

Channeling the spirit of habeas corpus, Kennedy did indicate a willingness to stretch the rules if the government seemed to be acting in bad faith to deny a detainee his rights:

I would acknowledge an exception if there is an indication that the Government’s purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or the identity of the custodian and the place of detention. . . . In this case, if the Government had removed Padilla from the Southern District in New York but refused to tell his lawyer where he had been taken, the District Court would have had jurisdiction over the petition.17

Such a willingness to make limited exceptions illustrates both the fickle nature of interpreting law, especially where constitutional, statutory, and common law meet, as well as the fact that habeas corpus, in particular, is characterized as much by its function – the determination and ultimate liberation of those unjustly detained – as it is by its process, which is subject to rules and also rule-bending. If Kennedy

suspected the venue change was an attempt to circumvent habeas corpus protections, he would have presumably sided with the dissent. Instead, he argues that

[b]oth Padilla’s change in location and his change of custodian reflected a change in the Government’s rationale for detaining him. He ceased to be held under the authority of the criminal justice system . . . and began to be held under that of the military detention system. Rather than being designed to play games with forums, the Government’s removal of Padilla reflected the change in the theory on which it was holding him.\(^{18}\)

Therefore, somewhat confoundedly, the government had a right to change Padilla’s location and exempt him from his previous district’s habeas corpus reach because it did so not with the purpose of escaping judicial review – although it cannot be ignored that the district overseeing the South Carolina military brig is much more conservative on “law and order” questions (more deferential to executive authority) – but rather with a “change in the theory” behind his detention. That the change in theory meant the application of the “enemy combatant” status, whose purpose always was to put the president above traditional due process protections concerning detainees, did not seem to matter. Indeed, as Kennedy says, “[w]hether that theory is a permissible one, of course, is a question the Court does not reach today.”\(^{19}\)

Stevens’s dissent hints at the possibility that the government had indeed moved Padilla for the purposes of finding a more favorable judicial environment, when he argues that the best venue should be seen in terms of “the placement most likely to minimize forum shopping by either party.”\(^{20}\)

Because the Padilla decision turned on jurisdictional issues, the fundamental question of whether a so-called enemy combatant can be detained without due process or habeas corpus rights was not resolved. It is notable, however, that the government in all its arguments is simultaneously dedicated to the supposed letter of the law, obsessed with every technicality, while upholding the very broad general principle that the executive should have sweeping powers of detention over “enemy combatants,” lest the country shall be threatened by terrorists. There is no time for legal technicalities, supposedly, yet those arguing on the government’s behalf never run out of them.

By the time a court was about to vindicate Padilla’s habeas corpus rights, the administration finally tried him to avoid taking the American citizen “enemy combatant” doctrine back to the Supreme Court. Padilla would eventually get his day in court, but justice, as ordinarily defined, would never be served in this case.

Although it lost the day and was no respite for Padilla, Stevens’s dissent brings matters back to fundamentals, displaying the overarching theme that the purpose of habeas corpus is to protect detainees from unjust detention. Thus he quotes a

\(^{18}\) 542 U.S. 426, 455.

\(^{19}\) 542 U.S. 426, 455.

\(^{20}\) 542 U.S. 426, 463 (Stevens dissenting).
1973 Supreme Court case: “[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.”

So does he celebrate “the Great Writ’s ‘ability to cut through barriers of form and procedural mazes’” in appealing to the common-sense truth “that the writ reaches the Secretary as the relevant custodian in this case.” Stevens also points out that this habeas decision, like all habeas decisions, has its relevance in the context of a history going back hundreds of years, a struggle between the forces of unlimited despotism and those of liberty:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. . . . [I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.


22 542 U.S. 426, 462 (Stevens dissenting), quoting 394 U.S. at 291.

23 542 U.S. 426, 465 (Stevens dissenting).
APPENDIX E

Analysis of *Hamdi v. Rumsfeld*

In this case, the Supreme Court ruled against the Bush administration, reversing the Fourth Circuit Court’s ruling that a mere executive assertion in the form of a declaration by Defense Department official Michael Mobbs was sufficient to detain Hamdi as an enemy combatant and that the government did not have to turn over relevant documents for review.

Interestingly, there was no pure majority in this case, but eight out of the nine justices did agree that the administration’s policy did not satisfy due process. Justice O’Connor spoke for the Court and was joined by Rehnquist, Kennedy, and Breyer. Souter wrote a partial concurrence and partial dissent, agreeing with the results of the decision. Scalia wrote a sharp dissent, notably expressing the most radical disagreement with the administration concerning treatment of American citizens held as enemy combatants within the United States. Thomas dissented also, but with an entirely different rationale.

The government had argued, once again, that the authorization of military force after 9/11 justified the detention policy, and Hamdi’s “enemy combatant” status justified indefinite detention without formal charges or proceedings until the government decides otherwise.¹ The Appeals Court siding with the government reasoned that “if Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan, the government’s present detention of him is a lawful one.”² But, of course, this begs the question: How do we know if he’s really an enemy combatant? His father insisted, plausibly, that Hamdi was in Afghanistan for relief work, as were many others rounded up. All along, including after his release, Hamdi claimed he was innocent.³

² 296 F. 3d 278, 283 (2002).
The Mobbs Declaration had asserted that “individuals associated with” al Qaeda or the Taliban “were and continue to be enemy combatants,” a rather broad definition. The Fourth Circuit found that this, along with the fact it was “undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict,” meant that the judiciary should just defer to the executive on his detention. It was a violation of the separation of powers, it argued, for the Court to intervene. It found the Geneva Conventions did not apply. It concluded that the president had these powers by virtue of the Constitution and even if he did not, he got such powers from the Authorization for Use of Military Force (AUMF). As for Hamdi’s citizenship, the Fourth Circuit had found that “[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.” Citizenship only provides Hamdi the right to “a limited judicial inquiry . . . only to determine its legality under the war powers of the political branches.”

Hamdi’s counsel argued that his detention violated a law passed in 1971 to repeal the 1950 Emergency Detention Act, which had allowed the detention of alleged communists and others without traditional due process. The 1971 law states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress” and was passed amidst concerns that there might be a reprise of Franklin Roosevelt’s executively ordered Japanese Internment. The government responded that this law was not meant to control military detentions, and that at any rate Congress had authorized Hamdi’s detention with the AUMF.

O’Connor’s decision was a stirring but limited rebuke of the administration. She writes that “although Congress authorized the detention of combatants in the narrow circumstances alleged . . . due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” O’Connor “reject[s] the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts” in such cases. To the contrary, “unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions . . . . Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.” The process denied to Hamdi

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6 316 F. 3d, at 475.
7 Although, as was shown earlier, Congress did approve Roosevelt’s Internment policy.
10 542 U.S. 507, 535.
11 542 U.S. 507, 536.
had been a violation of the Due Process Clause of the Constitution, O’Connor writes, and without at least a process “to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention,” there must be another process: “a court that received a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.” When the case is remanded, he should also have access to an attorney, O’Connor concludes.

O’Connor argues that, although the parties to this case have different conclusions, they “[a]ll agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States” and that “suspension of the writ has not occurred here.” Therefore, it is appropriate that Hamdi was before an Article III court to test his detention. Furthermore, O’Connor denies the government’s and Fourth Circuit argument that the circumstances of Hamdi’s capture are “undisputed,” because Hamdi has not had a fair opportunity to dispute those facts.

The Court opinion, however, is hardly a purist attack on significant executive detention powers. O’Connor indeed concedes there is a “tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right.” Citing Matthews v. Eldridge, O’Connor opines that “the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest.” Because Hamdi’s case concerns “the most elemental of liberty interests – the interest in being free from physical detention by one’s own government” – she ultimately finds in the interest of the defendant’s limited right to habeas corpus. “[A]s critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during an ongoing international conflict,” she continues in one of her most compelling passages, “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”

O’Connor’s opinion sides with the administration in some important respects. It does “not reach the question whether Article II provides” the executive with plenary power to detain citizens as “enemy combatants.” It finds it unnecessary to decide that, because “Congress has in fact authorized Hamdi’s detention, through the AUMF” – opening the door to a very broad reading of the AUMF. “There can be no doubt,” writes O’Connor, “that individuals who fought against the United States

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12 542 U.S. 507, 538.
13 542 U.S. 507, 539.
14 542 U.S. 507, 525.
15 542 U.S. 507, 526.
in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”

But it is more than questionable that every foot soldier for the Taliban would count as a 9/11 terrorist under the AUMF. O’Connor also concludes that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant,” because in the famous “enemy combatants” case of Quirin in 1942, “one of the detainees, Haupt, alleged that he was a naturalized United States citizen.”

O’Connor’s decision also upholds the right of indefinite detention, although not for interrogations and only so long as the war is ongoing, subject only to the limited judicial process called for. As for the enemy combatants proceedings, O’Connor concedes that hearsay might be “the most reliable available evidence” and that “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity were provided.”

Souter, who was joined by Ginsburg, concurred in judgment but dissented in part. In particular, he takes issue with the notion that the AUMF gives the president the authority to the detention at issue and believes that the 1971 repeal of the Emergency Detention Act has bearing on the present circumstance. Citing the legislative history of the law, he denies that this legislation was meant to be limited to military detentions. He warns against making such a distinction in a footnote, for that would open the door to another Korematsu v. United States, and draws on Ex parte Endo to support his case for habeas review.

Souter also appeals to the principle of the separation of powers, dismissing the argument that the president, as commander in chief, has exclusive authority over wartime detentions; invokes the Geneva Convention against the presidential power to declare a captive beyond POW protections; finds the executive policy wanting

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19 542 U.S. 507, 518.
20 542 U.S. 507, 519.
23 542 U.S. 507, 546 (Souter concurring).
24 542 U.S. 507, 547, note 2 (Souter concurring).
25 542 U.S. 507, 544 (Souter concurring).
26 Souter writes that “the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory.” Ibid., 545 (Souter concurring). In response to the idea that the president is the nation’s “commander in chief” and thus has broad, unspecified powers under the Constitution, he cites the famous concurring opinion of Justice Jackson in the Youngstown Steel Seizure Case of 1942, specifically the insight “that the President is not Commander in Chief of the Country, only of the military.” Ibid. 552 (Souter concurring), citing 343 U.S. 579, 643–644 (1952).
27 Quoting the government’s own brief that says “the Geneva Convention applies to the Taliban detainees,” the justice argues that the current treatment of Hamdi does not satisfy the requirements of POW status and is contrary to the Geneva Convention, according to which “even in cases of doubt, captives are entitled to be treated as prisoners of war ‘until such time as their status has been
in light of the traditional laws of war and the PATRIOT Act, and, going further than O’Connor, finds the legal flexibility that might accompany martial law to be inapplicable in the case of Hamdi.

Justice Scalia agreed with the plurality that the detention of Hamdi failed the test of American law, but did not believe the plurality went far enough in repudiating the administration’s treatment of Hamdi, so he issued a strong dissent.

Scalia’s reasoning is very straightforward:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. When the exigencies of war prevent that, the Constitution’s Suspension Clause, Art. I § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment.

In short, Congress never suspended habeas corpus. Therefore, Hamdi, a citizen on American soil, has a right to habeas corpus and the normal protections of due process.

In his dissent, Scalia draws on the Anglo-American tradition of thought concerning habeas corpus, from the premier English legal theorist Blackstone to Hamilton determined by a competent tribunal.” In response to the government’s assertion that “the President’s determination that Taliban detainees to not qualify as prisoners of war is conclusive as to Hamdi’s status,” Souter responds that “reliance on this categorical pronouncement to settle doubt is apparently at odds with the military regulation that had codified the Geneva Convention into U.S. military practice and established “a detailed procedure for a military tribunal.” Ibid., 549–50 (Souter concurring).

If the detention process gets its legality from the laws of war, as the administration affirms, Souter questions “whether the United States is acting in accordance with the laws of war it claims as authority.” He also points out that the USA PATRIOT Act, passed by Congress thirty-eight days after passage of the AUMF, “authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings” and that it “is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would have not meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.” Ibid., 551 (Souter concurring).

While Souter concedes that sometimes, under martial law, emergency military commissions might be appropriate if civilian courts are not functioning, he denies there is such immediacy in this case: “Hamdi has been locked up for over two years.” Ibid., 552 (Souter concurring). Ultimately, Souter believes that “the Government has failed to justify holding [Hamdi] in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that” the 1971 limit on executive detention power “is unconstitutional.” While he goes further than the majority opinion in questioning the fundamental authority of the president to detain “enemy combatant citizens” and does not agree with O’Connor “that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi,” he believes that O’Connor’s decision “will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.” Ibid., 553–4 (Souter concurring).

542 U.S. 507, 554 (Scalia dissenting).
in the Federalist Papers. He cites Darnel’s Case from 1627 and celebrates England’s Habeas Corpus Act of 1679. “The writ of habeas corpus was preserved in the Constitution – the only common-law writ to be explicitly mentioned,” he notes.

Reviewing the writ’s history, Justice Scalia affirms that habeas corpus exists not just because of statutory or even constitutional law, but because of the very common law traditions that predate the American Republic and upon which our entire legal and constitutional system rests.

“The gist of the [Fifth Amendment’s] Due Process Clause,” writes Scalia, “as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” The traditions of our system predate and dictate the context and meaning of the system itself.

After summarizing the strong historical case for traditional habeas corpus, Scalia explains the question on which he believes the Hamdi case turns: “The relevant question . . . is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoings by aiding the enemy in wartime” (emphasis his).

Scalia’s answer is that “[c]itizens aiding the enemy have been treated as traitors subject to the criminal process.” The dissenting justice also points out that John Walker Lindh, the man captured in virtually the exact same circumstances as Hamdi, was “[t]he only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States” and that he “was subjected to criminal process” (emphasis his).

What’s more, Scalia is not satisfied by the plurality’s call for a makeshift, somewhat half-hearted version of habeas corpus relief. He does not believe the courts should be helping the executive to ensure that its detentions are legal, and if not, inform it on how to make the process more appropriate until it is satisfied. To the contrary,

31 542 U.S. 507, 555 (Scalia dissenting).
32 542 U.S. 507, 557–8 (Scalia dissenting), citing 3 How. St. Tr. 1 (K. B. 1627). Darnell’s Case is discussed in the next chapter.
33 542 U.S. 507, 446. Notice that he says “person,” not citizen, although in other cases he seems to believe there is a meaningful distinction as it concerns habeas corpus relief.
34 542 U.S. 507, 558–9. To come to this conclusion, Scalia returns back to English history. He cites England’s Statute of Treasons from 1350 and various treason trials from the seventeenth century. From the American experience, he cites federal court cases for alleged spies during World War I and the fact that “the citizens who associated with” the Nazi saboteur from World War II also got civilian trials in federal court (ibid., 559–60). As for the one Nazi saboteur who himself was an a U.S. citizen but denied habeas relief from a military commission by the Supreme Court, Scalia laments that “[t]he case was not this Court’s finest hour” and expresses the view that it strayed from the precedent set by Ex parte Milligan. Furthermore, Scalia believes Quirin is a bad precedent for Hamdi because in Quirin “it was uncontested that the petitioners were members of enemy forces. They were ‘admitted’ enemy invaders” (his emphasis). In the case of Hamdi, these facts were in dispute. Given this disagreement in fact, “Quirin left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release” (ibid., 579).
35 542 U.S. 507, 561.
in England, the “remedy was not a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, ‘he shall be discharged from his Imprisonment.’” Moreover, the “Act does not contain any exception for wartime.” In America, “[w]ritings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ.”

Scalia accuses the plurality of “distort[ing] the Suspension Clause” and “transmogrifying the Great Writ.” From his vantage point, the remedy and proper process are clear-cut:

The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. . . . It is not the habeas court’s function to make illegal detention legal by supplying the process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution . . . then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

Scalia sees the plurality’s approach as “step[ping] out of the courts’ modest and limited role in a democratic society” so as to clean up after bad governance by the other two branches:

Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free.

He also appeals to the Founding Fathers’ distrust of unlimited executive power, especially in wartime: “The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders’ general mistrust of military power permanently at the Executive’s disposal. . . . No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution’s authorization of standing armies in peacetime.” He argues that in England and America, when emergency seemed to warrant dispensing with traditional habeas corpus, it was done so through formal suspension.

Citing Ex parte Milligan, Scalia argues that American constitutional precedent is to reject military jurisdiction where courts were open and instead to treat Americans

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37 542 U.S. 507, 576.
38 542 U.S. 507, 577.
39 542 U.S. 507, 568.
40 542 U.S. 507, 562.
alleged with waging war upon the United States as criminal suspects. “The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi’s imprisonment without criminal trial is no less lawful than Milligan’s trial by military tribunal.”

To Scalia, someone in Hamdi’s situation clearly deserves habeas corpus rights, unless habeas has been formally suspended. The AUMF “is not remotely a congressional suspension of the writ.” In sharp contrast with the plurality, Scalia does “not think this statute even authorizes the detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns.” Scalia believes that the Clause “would be a sham” if it did not have serious teeth:

If the Suspension Clause does not guarantee the citizen that he will be either tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

As to the argument that the rights of habeas corpus must be “weighed” against the interests of the government, Scalia is not impressed, and takes serious issue with the plurality for coming “up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a ‘neutral’ military officer rather than judge and jury.” From his use of italics and punctuation, we can see Scalia is particularly unhappy with the plurality getting its sense of “judicious balancing” from Matthews v. Eldridge, “a case involving...the withdrawal of disability benefits!” (author emphasis).

Given his exhilarating dissent from both the administration and the plurality’s lackadaisical deference to habeas corpus, Scalia tellingly admits his perspective has “a relatively narrow compass.” He believes a robust habeas corpus applies “only to citizens...detained within the territorial jurisdiction of a federal court.” Aside from Hamdi, he expects such reasoning would only apply to “alleged enemy combatants” like Padilla. For citizens captured outside the United States, he cites Johnson v. Eisentrager to say the situation would be different. Furthermore, while he maintains a no-compromise position on habeas corpus for citizens so long as it has not been suspended, Scalia stresses that “it is not beyond Congress’s” competence to determine if indeed the privilege should be officially suspended. He betrays substantial trust toward Congress in deciding what is best for the country:

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41 542 U.S. 507, 566–7, citing Ex parte Milligan 4 Wall. 2, 128–9 (1866).
42 542 U.S. 507, 575.
If the situation demands it, the Executive can ask Congress to authorize suspension of the writ – which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an “invasion,” and whether those attacks still justify suspension several years later, are questions for Congress.

This raises an important question of who indeed is supposed to determine whether an invasion or insurrection has occurred. If it is up to Congress to decide this, and Congress has the power to act on it with a suspension of habeas corpus, it would seem that the Suspension Clause is not much of an effective restriction whatever.

Scalia’s dissent is very radical, as it concerns the rights of citizens detained on home soil while courts are operating to have access to traditional habeas corpus, so long as it has not been suspended. But outside of that narrow field, we see all the caveats that emerge in Scalia’s construction: Non-citizens detained anywhere, or citizens detained abroad or while courts are not operating, or detainees stripped of habeas corpus rights officially by Congress, do not receive any relief from Scalia’s seemingly principled and bold dissent. While he waxes eloquent on the centuries-long tradition of habeas corpus, a most sacred tenet of our common law predating the Constitution – while he appears to believe this much is at stake – it would seem that any number of technicalities could undo this venerable heritage of the Great Writ. He is incredulous that the Court would be cavalier about chipping away at a great Anglo-American precept going back to the thirteenth century. At the same time, he seems very comfortable about the idea that Congress can suspend habeas corpus at will, deciding for itself whether a threat constitutes an “invasion,” or that the president can detain citizens abroad indefinitely without due process of law. In the next case, we see Scalia sing a very different tune, technically compatible with what he says in *Hamdi*, but demonstrating a nearly opposite view on how superior a concept habeas corpus really is.

Justice Thomas, on the other hand, shows no sympathy even for the American citizen detained at home who complains that his habeas rights have been stripped – so long as the president declares the man a terrorist. He is indignant that the Court would dare disrupt the executive branch’s prerogative:

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners’ habeas challenge should fail, and there is no reason to remand the case. . . . I do not think the Federal Government’s war powers can be balanced away by this Court.44

44 542 U.S. 507, 579 (Thomas dissenting).
Because *Hamdi* touches on a case of national security, Thomas calls for utmost deference to the executive branch, which must have a virtual blank check over detention policy.\(^45\) Although he concedes that Congress has the constitutional power to be involved, the judiciary should stay out, lest it be interfering with not just executive but congressional authority.\(^46\)

In domestic affairs, conservative judges like Thomas often stress that Congress must adhere to the principle of enumerated powers – the idea that any government power must be specifically authorized in the Constitution.\(^47\) On executive power during wartime, however, he flips this on its head: “the fact that Congress has provided the President with broad authorities does not imply – and the Judicial Branch should not infer – that Congress intended to deprive him of particular powers not specifically enumerated.”\(^45\)

While Thomas concedes “that the question whether Hamdi’s executive detention is lawful is a question properly resolved by the Judicial Branch,” he believes that “the question comes to the Court with the strongest presumptions in favor of the Government.” The Court “lack[s] the information and expertise to question whether Hamdi is an enemy combatant.”\(^49\) In short, it seems that the courts have a role to play, but that role is to just follow whatever the omniscient Executive claims.

\(^{45}\) Because “national security . . . is the primary responsibility and purpose of the Federal Government,” Thomas reasons that the government must obviously have any power necessary to counter anything that might threaten that security. Relying on Hamilton, Thomas reasons that “because the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the nation” (emphasis added). Moreover, “[t]he Founders intended that the President have primary responsibility – along with the necessary power – to protect the national security and to conduct the Nation’s foreign relations.” He discusses the theory of the “unitary executive” and explains that the president, as head of the executive branch, must wield this “power to protect the Nation” “without limitation.” Ibid. (Thomas dissenting), 580. In other words, if something is a threat to national security, the president must have whatever powers it might take to handle it. Instead of going by the text of the Constitution, Thomas deduces this grand conclusion from the facts that we have a government, it is supposed to protect our rights, and the president is in charge of it.

\(^{46}\) While Congress “has a substantial and essential role in both foreign affairs and national security . . . it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.” Ibid. (Thomas dissenting), 582. Interestingly, whereas Scalia’s dissent argues that judicial attempts to water down habeas corpus for citizens are a usurpation of congressional power, Thomas is here arguing that judicial attempts to enforce habeas corpus – to carry out a judicial function – are a usurpation of congressional as well as presidential power.

\(^{47}\) See Thomas’s dissent in *Gonzales v. Raich*, where the Court upheld the power of the federal government to enforce national drug laws that conflicted with state medical marijuana laws. 545 U.S. 1 (2005). (“Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything – and the Federal Government is no longer one of limited and enumerated powers. . . . To act under the Necessary and Proper Clause . . . Congress must select a means that is ‘appropriate’ and ‘plainly adapted’ to executing an enumerated power.”)


\(^{49}\) 542 U.S. 507, 585.
Whether this executive authority is inherent in the Constitution is, Thomas argues, irrelevant, because Congress authorized the president to kill suspected terrorists in the AUMF, and certainly imprisoning suspected terrorists is not as awesome a power as killing them.\footnote{50} By Thomas’s logic, the president could do whatever he wanted to anyone on earth, so long as he calls that person a terrorist. “It could be argued that bombings and missile strikes are an inherent part of war, and as long as our forces do not violate the laws of war, it is of no constitutional moment that civilians might be killed. But this does not serve to distinguish this case because it is also consistent with the laws of war to detain enemy combatants exactly as the Government has detained Hamdi.”\footnote{51} After all, if he can kill anyone he considers a terrorist, he can do something lesser to them – and anything is lesser than killing.\footnote{52}

This raises some further questions, such as where Congress gets the authority to empower the president in such a manner. Where does the Constitution authorize the Congress to delegate the dictatorial power to the president to kill anyone he considers a terrorist, if that would also entail being allowed to detain and presumably torture anyone he considers a terrorist? As to whether the president’s determination that someone is in fact a terrorist, Thomas writes that “the President’s authority to detain enemy combatants . . . includes making virtually conclusive factual findings.” Conclusive, and ones with indefinite implications: Thomas disagrees with the plurality that the detention can persist only so long as the actual hostilities continue. If the war in Afghanistan ever did end, he would presumably believe indefinite detention could continue.\footnote{53}

\footnote{50} The “President well may have inherent authority to detain those arrayed against our troops” – or, rather, those whom the president \textit{claims} are so arrayed – even without congressional authorization, according to Thomas. But “we need not decide that question because Congress has authorized the president to do so” through the AUMF, contrary to what Scalia says in his dissent. Ibid., 587. Since the AUMF authorizes the killing of persons the president deems are terrorists, Thomas quotes Moyer \textit{v. Peabody} (1909) to conclude that he can detain anyone he wants: “[T]he Court has previously concluded that language materially identical to the AUMF authorizes the Executive to “make the ordinary use of soldiers . . . ; that he may kill persons who resist and, of course, that he may use the milder measure of seizing [and detaining] the bodies of those whom he considers to stand in the way of restoring peace.” Ibid., citing 212 U.S. 78, 84 (1909).

\footnote{51} 542 U.S. 507, 597 (Thomas dissenting).

\footnote{52} Thomas draws on a history of the judiciary upholding broad executive power especially concerning emergencies and finds that to break from this tradition would invite lawlessness. He cites Moyer’s unanimous affirmation of a governor’s right to detain indefinitely those suspected of involvement in insurrection: “When it comes to a decision by a head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the movement.” Ibid., citing 212 U.S. 78, 85 (emphasis added by Thomas). He also cites \textit{Luther v. Borden}, which stated that if the courts could “discharge those who were arrested or detained” by U.S. military at the order of the president in the name of suppressing insurrection, it would be “a guarantee of anarchy, and not of order.” Ibid., 590–1, citing 7 How. 1 (1849), at 43. Thomas also believes that earlier cases that upheld conscription and mass vaccination even for Americans who “show no signs of illness” bolster his case. Ibid. 592, citing \textit{Selective Draft Law Cases}, 245 U.S. 366 (1918) and \textit{Jacobson v. Massachusetts}, 197 U.S. 11 (1905).

\footnote{53} 542 U.S. 507, 588 (Thomas dissenting).
Although Thomas agrees that the precedent flowing from *Ex parte Milligan* “supports [Scalia’s] position,” and notes other cases concerning criminal jurisdiction under military courts that add more support, he maintains that “the punishment-nonpunishment distinction harmonizes all of the precedent.” Because Hamdi is not being “punished,” special rules deferential to executive power must apply. “[I]f criminal processes do not suffice” to protect the nation, and something must be done, the Court should not interfere.\(^{54}\)

What purpose could there be in detaining someone like Hamdi, if not as a formal POW or as a criminal suspect being tried or punished? Thomas does say that “detention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Government avers has become all the more important in the war on terrorism.” But how do we even know the government is being honest about why it’s detaining someone? Thomas believes “a meaningful ability to challenge the Government’s factual allegations [would] probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets.”\(^{55}\) This sounds very dire, and although Thomas believes the federal courts should butt out of national security affairs and “are simply not situated to” adjudicate detention policy, he seems confident that forcing the government to explain why it is detaining someone is likely a way to aid the enemy with top secrets.

As for the Suspension Clause, Thomas does not agree with Scalia’s overall reading (although he agrees that in the case of formal suspension, the Court could not review it). The Clause only allows for the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it,” and Thomas is concerned that “this condition might not obtain here or during many other emergencies during which this detention authority might be necessary.” If those conditions must apply, and Congress must suspend the writ formally for indefinite executive detentions without charge to be legal, this would put Congress in a bind, where it “would then have to choose between acting unconstitutionally and depriving the President of the tools he needs to protect the nation.” Furthermore, even if Congress *did* suspend the Writ, Thomas “do[es] not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy.”\(^{56}\)

Thomas has a point here. Just because Congress suspends the Writ of Habeas Corpus does not mean that indefinite detentions in themselves become lawful. This is an important legal and moral insight, although Thomas does not delve into the full implications. While the constitutional protection of habeas corpus may be necessary to maintain justice in detentions, it is hardly sufficient. Just as a court can wrongly

\(^{54}\) 542 U.S. 507, 592–3 (Thomas dissenting).

\(^{55}\) 542 U.S. 507, 595–6 (Thomas dissenting).

\(^{56}\) 542 U.S. 507, 594 (Thomas dissenting).
approve a morally unjust detention, Congress can wrongly – but, constitutionally – allow illegal detentions to continue.

Thomas does not seem to appreciate that the writ of habeas corpus is a limited remedy, and therefore presidential detentions deserve extreme scrutiny even if habeas has not been suspended and even if habeas is being used. If even Congress’ suspension does not make illegal detentions legal, does this not imply that a presidential detention can, in fact, be illegal and does, in fact, need to be scrutinized – that is, if he is not by definition beyond the law? An even more worrisome question is: If even an unconstitutional suspension of Habeas Corpus – say, at a time when there is no threat to the public safety, no rebellion or invasion – is unreviewable by the Court, as Thomas and indeed Scalia insist, then what kind of protection is the Suspension Clause anyway? How does it effectively constrain the power of Congress to suspend Habeas Corpus inappropriately? (See the concluding chapters for the author’s interpretation.)

Thomas assumes that “the power to protect the Nation must be the power to do so lawfully.” The implications here are radical. On the one hand, it means that anything deemed necessary to protect the country must be legal by definition. This is clearly a formula for pure executive despotism. But on the other hand, perhaps there is another way to interpret this: Perhaps a nation supposedly built upon the rule of law cannot in any sense be protected when fundamental laws, such as the common law protection of habeas corpus, are being flouted. Perhaps the act of dispensing with habeas corpus is in itself a mark of failing to protect the nation.
APPENDIX F

Analysis of Rasul v. Bush

The Court was presented with three questions: Did the lower courts apply Eisentrager incorrectly? Did they incorrectly hold that foreign nationals had no constitutional rights? Did the indefinite, solitary detention of these prisoners without charge violate the Due Process Clause of the Fifth Amendment? The detainees made two major arguments of merit in the Rasul brief, that American habeas corpus law gave the District Court jurisdiction, and the administration had no compelling reason to ignore this law. The lawyers argued that “the Court has long recognized that federal courts have the power to review every species of Executive imprisonment, wherever it occurs and whatever form it takes.” In oral arguments, the detainees’ attorney John Gibbons stressed that Guantánamo was, for all intents and purposes, under U.S. law, and what Bush had been attempting was the creation of “a no-law zone, not accountable to any judiciary, anywhere.” Solicitor General Olson, in response, argued that no judge had any sort of jurisdiction over Guantánamo, but conceded that the government’s argument would differ if the detainees in question were American citizens.2

As it proceeded to decide, the question for the Court was narrow: “whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base.”3 Stevens points out that the “United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War.” Although “[u]nder the agreement, ‘the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba’” over the relevant areas, “the

1 Ball, 91–3.
2 Ball, 98.
United States shall exercise complete jurisdiction and control over and within said areas.”

Stevens appears to reason that the practice of habeas corpus was not decisively limited by *Johnson*, because the Judiciary Act of 1789 and the Habeas Corpus Act of 1867 extend the writ’s protection to prisoners “in custody, under or by colour of the authority of the United States” and to “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,” respectively. (Indeed, if the Habeas Corpus Act protects people from detentions in violation of treaties, this would seem to provide an indirect cause for enforcement of the Geneva Convention.)

Even more fundamentally, Stevens argues that habeas predates the Constitution, was part of American law even before independence. He cites *Williams v. Kaiser*, which described Habeas Corpus as “a writ antecedent to statute . . . throwing its root deep into the genius of our common law.” The writ of habeas has evolved, argues Stevens, but always toward the principle that unchecked executive detention is a formula for despotism. As Scalia did in the case of Hamdi, Stevens also cites examples from English history, but in this case to make the argument that jurisdiction should apply to nominally foreign territories: “As Lord Mansfield wrote in 1759, even if a territory was ‘no part of the realm,’ there was ‘no doubt’ as to the court’s power to issue writs of habeas corpus if the territory was ‘under the subjection of the Crown.’” In America, “the courts of the United States have traditionally been open to nonresident aliens.”

In regard to whether *Eisentrager*, discussed in Chapter 6, should be the final word for *Rasul*, Stevens lays out some distinctions:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Furthermore, Stevens notes that the *Eisentrager* Court decided only upon the “prisoners’ constitutional entitlement to habeas corpus . . . The Court had far less to say on the question of the petitioner’s statutory entitlement to habeas review.”

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6 542 U.S. 466, 473–4, citing 323 U.S. 471, 484, note 2 (1945) (internal quotation marks omitted).
9 542 U.S. 466, 476.
10 542 U.S. 466, 476.
also contends that one of the precedents for *Eisentrager* had since been modified by an intervening ruling. 11 Scalia is unconvinced of this technical point in his dissent. 12

Justice Kennedy concurred with the judgment but found it worthwhile to explicitly lay out his reasons, for his “analysis follows a different course.” In his “view, the correct course is to follow the framework of *Eisentrager*.” 13

“Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States,” Kennedy writes, “and because the existence of jurisdiction would have had a clear harmful effect on the Nation’s military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts to hear the prisoner’s claims. . . . The decision indicates that there is a realm of political authority over military affairs where the judicial power may not enter.” Kennedy does not believe this situation is sufficiently parallel to the one in *Rasul*, however, because “Guantánamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities” and because “the detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status,” unlike in *Eisentrager*, where “the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms.” 14 Thus, whereas Stevens finds *Eisentrager* somewhat outdated given subsequent Court decisions, Kennedy appears to find *Eisentrager* sound but nonapplicable.

Justice Scalia, whose dissent in *Hamdi* demonstrated a deep appreciation of habeas corpus and its history as it concerns citizens, dissented strongly from *Rasul* because he believed the Court was overstepping its bounds in extending the reach of habeas to Guantánamo. “The Court holds today that the habeas statute,” writes Scalia, “extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts.” He considers this “a novel holding” that “contradicts a

11 Stevens argues that *Eisentrager* relied on *Ahrens v. Clark* but that the latter precedent had been updated by *Braden v. 30th Judicial Circuit Court of Kentucky*, which held “that the prisoner’s presence within the territorial jurisdiction of the district court is not an invariable prerequisite’ to the exercise of district court jurisdiction under the federal habeas statute” 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.” The District Court could thus claim personal jurisdiction over the custodian so long as he “can be reached by service of process” (*542 U.S. 466, 478 [2004]*, citing *410 U.S. 484, 494–495 [1973]*)).

12 Scalia notes that *Braden* “dealt with a habeas petitioner incarcerated in Alabama” and “stands for the proposition, and only the proposition, that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement. Outside that class of cases, *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*)” (*542 U.S. 466, 494–5*).

13 *542 U.S. 466, 485* (Kennedy concurring).

14 *542 U.S. 466, 485–8* (Kennedy concurring).
half-century-old precedent on which the military undoubtedly relied, Johnson v. Eisentrager.”

Quoting Kokkonen v. Guardian Life Ins. Co. of America, Scalia declares that “Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” Dismissing the importance of whether jurisdiction is over the custodian or the detainee, he argues, “[n]o matter to whom the writ is directed . . . the statute could not be clearer that a necessary requirement for issuing the writ is that some federal district court have territorial jurisdiction over the detainee. Here, as the Court allows . . . the Guantánamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of these cases.”

Scalia manages to focus both on legal nuances and the presumed consequences of the Court going one way or another. Ultimately, he is results oriented in his dissent, especially worried that the decision “has a potentially harmful effect upon the Nation’s conduct of a war.” “[T]he Court springs a trap on the Executive,” he protests, “subjecting Guantánamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction – and thus making it a foolish place to have housed alien wartime detainees.” But this begs the question, is it necessarily “foolish” to detain aliens at wartime if doing so subjects them to judicial oversight?

Scalia seems unhappy with the result that extending habeas to Guantánamo would affect “600 prisoners,” each of whom “undoubtedly has complaints – real or contrived” about the conditions of their detention. Even worse, under the Court’s “holding Guantánamo Bay detainees can petition in any of the 94 federal judicial districts.” Moreover, if the standard is “jurisdiction and control,” then there is another grave concern, “[s]ince ‘jurisdiction and control’ obtained through a lease is no different in effect from ‘jurisdiction and control’ acquired by lawful force of arms,” meaning that “parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws.” This might open the door, Scalia fears, to “allow[ing] prisoners to sue their captors for damages.” But is not the implication of Scalia’s perspective that the U.S. government can conquer, occupy, and maintain permanent control over any territory while depriving the people there of any and all rights? Is this really something the Constitution is silent on?

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15 542 U.S. 466, 488 (Scalia dissenting).
17 542 U.S. 466, 490.
18 542 U.S. 466, 506.
19 542 U.S. 466, 497–8.
20 Ibid.
21 542 U.S. 466, 506.
22 542 U.S. 466, 501.
23 542 U.S. 466, 500.
This raises an interesting point. At what point should an occupying force be subject to its own judicial checks and balances? Indeed, if the United States is detaining hundreds in Iraq and Afghanistan who could just as easily be brought to Guantánamo, and if habeas extends to the latter, why not to the former? Perhaps it should.

As for the oddity that “94 federal judicial districts” would all have jurisdiction over Guantánamo, why is this a problem? Until Congress establishes proper jurisdictional rules, maybe this default isn’t so bad. And while Scalia worries about this, it would seem a similar problem would present itself relating to U.S. court jurisdiction over citizens’ habeas corpus claims abroad. But he seems to have much less problem with the idea that habeas corpus would extend to citizens detained all over the world. He upholds *Eisentrager* for “holding that aliens abroad did not have habeas corpus rights” while also holding “that United States citizens throughout the world may be entitled to” such rights. Would this not portend the jurisdictional chaos he fears? In arguing for the sharp distinction between citizens and foreigners, he even invokes the history of England, which notoriously subjected foreigners within its control to different standards from those enjoyed by its imperial subjects: “None of the exempt jurisdiction or dominion cases the Court cites involves someone not a subject of the Crown,” Scalia argues. “The rule against issuing the writ to aliens in foreign lands was still the law [in 1939] when . . . an English court considered the habeas claims of four Chinese subjects detained on criminal charges in Tientsin, China, an area over which Britain had by treaty acquired a lease.”

But Scalia has a valid point. The principled reasoning that would extend habeas corpus to Guantánamo could be used to extend it everywhere on Earth. As we see in the following paragraph, it is unclear that the precedent is really there in Anglo-American traditions.

However, more important is the spirit of habeas corpus as it developed in England and America. Its very tendency to stretch its reach to liberate ever more people from under the clutches of lawless detention has always been the writ’s great strength. Habeas corpus was not created consciously in a perfected form. It was created as a tool by the king’s own courts and then after centuries turned against the king – and yet never effectively enough turned against him for the purposes of the American Revolutionaries. That habeas did not extend as broadly in recent English or even American history is no reason to assume that it never should, or that if it did this would be a betrayal of its true purpose.

The purpose of habeas corpus is to challenge executive detention and free the wrongly detained. This was the purpose to which it was put in the decisions of *Hamdi* and *Rasul*. While Thomas’s dissent in *Hamdi* and Scalia’s dissent in *Rasul* note some valid points about the problems that an expansive use of habeas corpus would present for executive power during war, or for defining its limits in the future.
these dissents miss the forest for the trees. The revered function of habeas corpus is to obstruct executive power. The legacy of habeas has always been that of an evolving writ. Contra Thomas, the Great Writ, born and raised for centuries in the courts of judges, has always been, simultaneously, an evolving product of judicial activism in the best sense, and a timeless remedy rooted in the natural law tradition that defies all despots everywhere who would detain anyone anywhere without cause.
APPENDIX G

Analysis of *Hamdan v. Rumsfeld*

*Hamdan v. Rumsfeld* might be the most complicated of the Supreme Court habeas cases after 9/11 discussed in this book. The major issues concerned federal habeas jurisdiction over Guantánamo, the military commissions, and the enforceability of the Geneva Conventions.

Writing for the Court, Stevens ruled that “the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.” He notes in his decision that while Hamdan is charged with associating with terrorists and conspiracy, “[t]here is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.”

At the center of this decision is the question of whether the Detainee Treatment Act (DTA) retroactively stripped courts, including the Supreme Court, of habeas jurisdiction over cases already under review. Stevens mentions Hamdan’s argument, quoting from *Ex parte Yeager*, that “the denial to [the Supreme Court] of appellate jurisdiction” to review original habeas corpus writs would “greatly weaken the efficacy of the writ,” as well as his argument that Congress unconstitutionally suspended habeas corpus, assuming the government’s reading is correct. But the Court “find[s] it unnecessary to reach either of these arguments.” Instead, “[o]rdinary principles of statutory construction suffice to rebut the Government’s theory” that DTA retroactively stripped the Court of jurisdiction over pending cases. Stevens is unimpressed by the government’s assertion that “Congress’ failure to expressly reserve federal courts’ jurisdiction over pending cases erects a presumption against jurisdiction.”

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Stevens hinges his argument about retroactivity on the language of the DTA, and whether certain clauses pertain to other ones. Much of the legal reasoning in Hamdan is quite technical, seemingly more concerned at times with fashioning a novel argument than with sticking to solid and high principles.

Stevens concedes that there is a precedent for “applying intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.” “But the ‘presumption’ [of retroactivity] that these cases have applied,” writes Stevens, “is more accurately viewed as the nonapplication of another presumption – viz., the presumption against retroactivity – in certain limited circumstances.” Because this case involves the changing of a tribunal, rather than a shift in substantive rights, Stevens believes there is no problem with dispensing with retroactivity.

The government had submitted that it would be an “absurd result” to allow the Court jurisdiction in this case, because the DTA, by giving “exclusive jurisdiction” to the District of Columbia Circuit, would, under such reasoning, produce a contradictory dual jurisdiction. Stevens points out the problem with this objection: the “exclusive jurisdiction” conferred by DTA is in “determin[ing] the validity of any final decision of a CSRT or commission.” Hamdan was asking for a collateral attack on the process well before any final decision was made – and a collateral attack is not precluded by the DTA.

The government had argued that Councilman, a Supreme Court decision, established a precedent that the Court, even if it has statutory jurisdiction over a military

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5 Specifically, section 1005, subsection (e), paragraphs (1) through (3) concern the “Judicial Review of Detention of Enemy Combatants.” The first paragraph pertains to review generally, the second to review of CSRTs and the “propriety of detention” and the third to “review of final decisions of military commissions.” Whereas subsection (h), paragraph (2) says that paragraphs (2) and (3) of subsection (e) “shall apply with respect to any claim whose review is governed by one of such paragraphs that is pending on or after the date of the enactment of this Act,” the retroactivity provision of subsection (h), paragraph (2) omits the general review provision in subsection (e), paragraph (1). Detainee Treatment Act, 2005, §1005 (e)(1), (e)(2), (e)(3) and (h)(1) (548 U.S. 557, 573–4 (2006)).


7 Stevens argues that non-retroactivity can be inferred “from the exclusion of language from one statutory provision that is included in other provisions of the same statute.” He cites Lindh v. Murphy, 521 U.S. 320, 326 (1997), a case in which “certain limitations on the availability of habeas relief imposed by” the 1996 Anti-Terrorism and Effective Death Penalty Act were determined to apply “only to cases filed after that statute’s effective date.” This conclusion in Lindh turned on the omission of certain language, and Stevens believes “the evidence of deliberate omission is stronger [in Hamdan] than it was in Lindh.” Stevens shows that Congress could have made it clear that the stripping of habeas jurisdiction was retroactive, but declined to pass such language, and “Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation.” Because “Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases,” but not (e)(1), Hamdan v. Rumsfeld, 548 U.S. 557, 578–9 (2006).

8 Thus, “[t]here is nothing absurd about a scheme under which pending habeas actions – particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed – are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review.” Hamdan v. Rumsfeld 548 U.S. 557, 583–4 (2006).
tribunal, should await that tribunal’s final decision before interfering. Stevens finds that Councilman, which concerned a U.S. serviceman accused of a marijuana offense, does not apply to “enemy combatants” detained as part of a war.9

Moving on to the legitimacy of the commissions and duly operating courts, Stevens says that he has “no doubt that the various individuals assigned review power under [Bush’s commission order] would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled” but that, “[n]evertheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces.” Instead of deference, Stevens says the Court’s traditions would dictate careful review in this case. He calls Quirin “the most relevant precedent,” in which, “[f]ar from abstaining pending the conclusion of military proceedings, which were ongoing, [the Court] convened a special Term to hear the case and expedited . . . review.” And so he “proceed[s] to consider the merits of Hamdan’s challenge.”10

Invoking the history of military commissions, tribunals “neither mentioned in the Constitution nor created by statute” but rather “born of military necessity,” Stevens commences to explain the ways in which Bush’s commissions are out of sync with the traditionally recognized legal principle that such commissions are nevertheless subservient to constitutional restrictions11 – a principle viewing military

9 Stevens rejects the argument, based on Councilman, 420 U.S. 738, that “even if [the Court has] statutory jurisdiction, [it] should apply the ‘judge-made rule that civilian courts should await the final outcome of military proceeding before entertaining an attack on those proceedings.’” As Stevens relates, Councilman involved a U.S. serviceman facing court martial over marijuana charges, and the Court decided to stay out of it because “military disciple and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts” and because “federal courts should respect the balance that Congress struck between military preparedness and fairness to individual servicemembers when it created ‘an integrated system of military courts and review procedures.’” It makes sense for the Court normally to avoid intervening in courts martial, as well as criminal trials. But in this case, “Hamdan is not a member of our Nation’s Armed Forces, so concerns about military discipline do not apply” and “the tribunal convened to try Hamdan is not part of the integrated system of military courts.” Hamdan v. Rumsfeld, 548 U.S. 557, 586–7 (2006).


11 “Though foreshadowed in some respects by earlier tribunals convened to try British Major John André for spying during the Revolutionary War, the commission “as such” was inaugurated in 1847. . . . General Winfield Scott that year ordered the establishment of both “military commissions” to try ordinary crimes committed in the occupied territory and a “council of war” to be used for the laws of war. “[D]uring the Civil War . . . a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike.” Whereas courts-martial were generally reserved for members of the armed forces, military commissions were more flexible in their use.” 548 U.S. 557, 590 (2006).

Ultimately, the commissions, to be legal, must exist from constitutional authority. Stevens quotes Quirin (317 U.S., at 25): “Congress and the President, like the courts, possess no power not derived from the Constitution.” As to the question, raised in Ex parte Milligan, of whether the president can “constitutionally convene military commissions ‘without the sanction of Congress’ in cases of ‘controlling necessity,’ Stevens writes that it has “not [been] answered definitely” by the Court and will not be in Hamdan. He also avoids settling “Quirin’s controversial characterization of Article of War 15 as congressional authorization for military commissions.” 548 U.S. 557, 592–3 (2006).
commissions as within the president’s original Article II powers that were in this case simply “activated” by congressional authorization after 9/11.\textsuperscript{12}

Stevens proceeds to discuss military commissions in the context of the common law. He says they have been used in three types of circumstances: “substitut[ing] for civilian courts at times and in places where martial law has been declared”; “to try civilians ‘as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function’”; and “when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.’” And “[s]ince Guantánamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available.”\textsuperscript{13}

Citing Colonel William Winthrop, the “Blackstone of Military Law,”\textsuperscript{14} Stevens outlines “at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan”: it only has jurisdiction over “offenses committed within the field of the convening commander”; the offenses must have been committed during the duration of the war; if not pursuant to martial law or an occupation, the tribunals can only try enemies for offenses against the laws of war or members of the same military for offenses not triable by criminals courts or under the Articles of war; and it can only try “violations of the laws and usages of war cognizable by military tribunals only” and “[b]reaches of military orders or regulatations for which offenders are not legally triable by court martial under the Articles of war.”\textsuperscript{15}

Stevens is troubled that Hamdan would face a charge of “conspiracy” that the government said predated 9/11 by several years, and sees no traditional law of war violated by Hamdan, according to the allegations leveled against him.\textsuperscript{16} The very charge of “conspiracy” is inconsistent with the Geneva Conventions, with The

\textsuperscript{12} Drawing further from Quirin, Stevens says that case “did not view the authorization as a sweeping mandate for the President to ‘invoke military commissions when he deems them necessary,’” but instead “that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions.” “Neither of the [post-9/11] congressional Acts . . . expands the President’s authority to convene military commissions.” AUMF simply “activated the President’s war powers,” including “the authority to convene military commissions in appropriate circumstances” and DTA “contains no language authorizing that tribunal or any other at Guantánamo Bay . . . . Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.” 548 U.S. 557, 593-5 (2006).

\textsuperscript{13} 548 U.S. 557, 597 (2006).

\textsuperscript{14} Reid v. Covert, 354 U.S. 1, 19, n. 38 (1957).


\textsuperscript{16} Addressing the time frame question, Stevens notes that “[t]he charge against Hamdan . . . alleges a conspiracy extending over a number of years, from 1996 to November 2001. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF.” Furthermore, “not a single overt act . . . is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.” 548 U.S. 557, 598–9 (2006).
Hague, and thus with Congress’s constitutional capacity to create tribunals to enforce the “Law of Nations.” Therefore, the justice reasons, there is little reason to consider conspiracy a proper crime to be tried by military commissions.

The government had argued that *Quirin* created a precedent for treating “conspiracy” as a law of war, but Stevens notes that the *Quirin* Court never mentioned the conspiracy charge. The government had cited Winthrop and historian Charles Roscoe Howland as authorities in treating conspiracy as a law of war violation, but Stevens counters that these men actually bolster his own interpretation that an overt act, independently criminal in its own right, had to be involved. In response to Justice Thomas’s example of Henry Wirz, a man tried for “conspiring . . . to injure the health and destroy the lives of soldiers in the military service of the United States” during the Civil War, Stevens notes that “Wirz was alleged to have personally committed a number of atrocities against his victims, including torture, injection of prisoners with poison” and other depredations, whereas his alleged co-conspirator R. B. Winder was ruled not to be tried by a commission because “there was as yet insufficient evidence of his personal involvement in the atrocities.”

17 Concerning conspiracy charges, Stevens writes that “[t]here is no suggestion that Congress has, in exercise of its constitutional authority to ‘define and punish . . . Offences against the Law of Nations,’ . . . positively identified ‘conspiracy’ as a war crime. . . . When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.” But the precedent is very unclear: “At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of “conspiracy” has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war.” 548 U.S. 557, 602–4 (2006).

18 The government had said “that the Nazi saboteurs in *Quirin* were charged with conspiracy.” Stevens’s rebuttal is that in the *Quirin* decision, “[n]o mention was made at all of . . . the conspiracy charge”; rather, the Court instead had said “[t]he offense [against the law of war] was complete when” the saboteurs “passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose” (*Quirin*, at 38). Stevens further argues that *Quirin* actually “supports Hamdan’s argument that conspiracy is not a violation of the law of war. . . . [The Court] took seriously the saboteur’s argument that there can be no violation of a law of war – at least not one triable by military commission – without the actual commission of or attempt to commit a ‘hostile and warlike act.’” It was because the saboteurs had in fact entered the country, planning hostilities, and had even admitted, that they were triable. 548 U.S. 557, 605–6 (2006).

19 The government had argued “that Winthrop at one point in his treatise identifies conspiracy as an offense ‘prosecuted by military commissions’ and had invoked historian Charles Roscoe Howland’s inclusions of ‘conspiracy ‘to violate the laws of war by destroying life or property in aid of the enemy’” as an offense that was tried as a violation of the law of war during the Civil War.” Stevens says such commissions “functioned at once as martial law or military government tribunals and as law-of-war commissions” and that in such cases conspiracy was only used if it involved both a conventional crime and the planning for it – “a species of compound offense of the type tried by the hybrid military commissions of the Civil War.” He writes that “Winthrop confirms this understanding later in his discussion, when he emphasizes that ‘overt acts’ constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts.” 548 U.S. 557, 604–8 (2006).

“[T]he only ‘conspiracy’ crimes that have been recognized by international war crimes tribunals,” writes Stevens, “are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a ‘concrete plan to wage war.’” And at Nuremberg, “[t]he International Military Tribunal . . . pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes . . . and convicted only Hitler’s most senior associates of conspiracy to wage aggressive war.”

Having countered the notion that conspiracy is a proper offense to be tried by military commission, Stevens moves on to say that “[t]he charge’s shortcomings are not merely formal, but are indicative of a broader inability on the Executive’s part here to satisfy the most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity. Hamdan’s tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. . . . Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court’s precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.”

But Stevens believes that the “commission lacks power to proceed,” even putting aside the issue of whether the charges are valid. He says it must meet the standards of the UCMJ, which codifies minimum standards from the American common law of war and international law, including the Geneva Conventions. He cites limitations on Hamdan’s right to counsel and, most conspicuously, the condition that he “and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’” What’s more, the commission “permit[s] the admission of any evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person,’” including hearsay and coerced confessions, and “witnesses’ written statements need not be sworn.” Stevens also points out the two-thirds necessary to convict, and the limited nature of the review process.

As to the government’s argument that the courts should stay out of the process until its completion, Stevens finds that the Court can intervene now, both because there is some legitimate reason to suspect the commission violates the law and also because there will be no automatic guarantee to post-conviction review, since that only occurs when the convict is sentenced to more than ten years’ imprisonment.

Whereas the normal precedent is for military commissions to maintain some parity with normal legal practice in terms of procedures and evidentiary rules, Stevens cites the case of Yamashita as the “glaring historical exception.” General Yamashita of imperial Japan surrendered in the Philippines to the United States in September 1945, pleaded not guilty, was tried, convicted, and sentenced to death for war crimes. The Court “upheld the denial of his petition for a writ of habeas corpus” . . . having determined “that Yamashita was neither a ‘person made subject to the Articles of War by Article 2’ . . . nor a protected prisoner of war being tried for crimes committed during his detention.” But since then, as Stevens notes, “the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture . . . [and so t]he most notorious exception to the principle of uniformity [in procedural rules] has been stripped of its precedential value.”

While there is some wiggle room for military commissions to deviate from the processes of court martial, “any departure must be tailored to the exigency that necessitates it.”

Under the UCMJ, the president is restricted in the procedures he can establish for commissions and courts-martial. They must be consistent with the UCMJ, however expedient it would be to flout the code, and the rules must be “uniform insofar as practicable.” Hamdan had argued that there were too many unacceptable deviations. The government had replied that only 9 of the UCMJ’s 158 articles actually apply to military commissions and Bush’s order conforms to them; that the president needed some flexibility for the practical goals of the war on terror; and that it would make no sense for all the courts martial rules to apply. “Hamdan has the better of this argument,” writes Stevens, who finds the president’s reasons for variation insufficient and notes the president’s failure to make an “official determination that it is impracticable to apply the rules for court martial.” Regarding the concern about terrorism, Stevens holds that “[w]ithout for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan’s trial, any variance from the rules that govern courts-martial.” While commissions did indeed develop in the face of exigent circumstances, there is no precedential justification for “the wholesale jettisoning of procedural protections,” which is “why the military commission’s procedures typically have been the ones used by courts-martial.”

“The procedures adopted to try Hamdan also violate the Geneva Conventions,” continues Stevens. The Appeals Court had “dismissed Hamdan’s Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections;
and (3) even if he is entitled to their protections,” the Court should stay out of it as it stayed out of the court martial in *Councilman*.27

The government had argued that *Eisentrager* was precedent for denying Hamdan Geneva Convention protections. Stevens points out that the *Eisentrager* “petitioners (unlike Hamdan here) had failed to identify any procedural disparity ‘between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank’” and that the 1929 Convention didn’t protect them for their crimes. Ultimately, the protections afforded to Hamdan by Geneva come from the same law of war that allows for trying people who break it.28

The government had argued that Geneva did not apply to the war on terror with al Qaeda and the Taliban, in part because al Qaeda, in particular, is not a signatory to the Convention. But the Court “need not decide the merits of this argument” because Common Article 3 provides minimum standards, including against summary judgment and execution of anyone who has laid down their arms.29

Stevens concludes his decision by emphasizing the procedural nature of his challenge to the administration. The Court “assume[s], as [it] must, that the allegations made in the Government’s charge against Hamdan are true” and while it does not “address . . . the Government’s power to detain him for the duration of active hostilities,” the process is lacking. “[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”30

Justice Kennedy, joined by Souter, Ginsburg, and Breyer, concurred in part with Stevens’s decision. Kennedy’s arguments mirror Stevens’s in many respects, but his reasoning is pithier and, finding his ruling against the military commissions sufficient, he does not rule on as many details.

Kennedy writes that Bush’s “Military Commission Order . . . exceeds limits that certain statutes, duly enacted by Congress, have placed on the President’s authority to convene military courts.” He invokes historical precedent, intoning that “[t]he

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29 The government’s response was that the war with al Qaeda is indeed “international in scope.” Stevens responds that the war is international in the sense of not being a civil war, but is not international in the sense of being between two nations that recognize Geneva: “Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory.” Common Article 3 thus “requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’” While such phrases are “not defined in the text of the Geneva Conventions . . . [they] must be understood to incorporate the barest of those trial protections that have been recognized by customary international law.” In particular, the “accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.” 548 U.S. 557, 629–34 (2006).
Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.” To put the military commissions in context, Kennedy discusses the Geneva Convention31 and the Uniform Code for Military Justice.32 Taken together, these restrict Article II courts and, according to Kennedy, the tribunal in question does not satisfy these restrictions.

While “Congress has addressed the possibility that special commissions – criminal courts other than courts-martial – may at times be convened . . . the President’s authority to convene [them] is limited.” It only pertains to offenses triable under statute or the law of war. But “[i]f the military commission at issue is illegal under the law of war, then an offender cannot be tried ‘by the law of war’ before that commission.”33 So the legality of the commission must be determined, and the Court is in a position to weigh in.

As to the question of whether the Convention is enforceable by the judiciary, Kennedy answers in the affirmative.34 He further finds the military commission a threat to the separation of powers35 and is unconvinced that an exception should be

31 The 1949 Geneva Convention requires “that military tribunals be ‘regularly constituted,’” a phrase that Kennedy writes “relies upon the importance of standards deliberated upon and chosen in advance of crises, under a system where the single power of the Executive is checked by other constitutional mechanisms.” And so “domestic statutes control this case.” Common Article 3 of the Geneva Convention, “part of a treaty the United States has ratified,” is “no doubt . . . part of the law of war,” writes Kennedy. Insofar as the military commission violates Common Article 3, it is thus in no legal position to try people for offenses against the law of war. 548 U.S. 557, 637–42 (2006) (Kennedy concurring).

32 “Congress has set forth governing principles for military courts,” Kennedy writes. “The UCMJ as a whole establishes an intricate system of military justice.” He reiterates the argument that under the UCMJ, military commissions should conform procedurally “to district court rules insofar as the President ‘considers practicable’”; that the procedures must not be inconsistent with or contrary to the UCMJ; and that uniformity of procedures must be respected “insofar as practicable.” He emphasizes that on this last standard, it not simply “insofar as the President considers it to be so. The Court is right to conclude this is of relevance to our decision.” He invokes Webster’s Dictionary to show that “practicable” means “‘feasible,’ that is, ‘possible to practice or perform.’” 548 U.S. 557, 639–40 (2006) (Kennedy concurring).

33 548 U.S. 557, 641 (Kennedy concurring).

34 Kennedy is unsatisfied by the finding in Eisentrager, quoted by Justice Thomas in his dissent, that the “[r]ights of alien enemies are vindicated under [the Convention] only through protests and intervention of protecting powers.” Regardless, writes Kennedy, “Common Article 3 is . . . relevant to the question of” whether the commissions are authorized in the first place. In In re Yamashita, Kennedy points out, “the Court . . . considered on the merits – without any caveat about remedies under the Convention – a claim that an alleged violation of the 1929 Convention ‘establish[ed] want of authority in the commission to proceed with the trial.’” 548 U.S. 557, 642–3 (2006) (Kennedy concurring).

35 Kennedy warns that “[t]rial by military commission raises separation-of-powers concerns of the highest order,” and that such “courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.” This would place “personal liberty in peril of arbitrary action by officials.” He writes that “an acceptable degree of independence from the Executive is necessary to render the commission ‘regularly constituted’ by the standards of our Nation’s system of justice.” 548 U.S. 557, 638 (2006) (Kennedy concurring).
carved out for the sake of exigency, given Hamdan’s detention at Guantánamo for nearly four years.\(^{36}\)

Given this context, “the structure and composition of the military commission deviate from conventional court-martial standards. Although these deviations raise questions about the fairness of the trial, no evident practical need explains them.”\(^{37}\)

Kennedy then describes some major deviations:

At a general court-martial – the only type authorized to impose penalties of more than one year’s incarceration or to adjudicate offenses against the law of war . . . – the presiding officer who rules on legal issues must be a military judge . . . an officer who is a member of a state or federal bar and has been specially certified for judicial duties by the Judge Advocate General for the officer’s Armed Service. . . . Here, by contrast, the Appointing Authority selects the presiding officer . . . and that officer need only be a judge advocate, that is, a military lawyer.\(^{38}\)

There are other conflicts of interest: “The Appointing Authority, moreover, exercises supervisory powers that continue during trial,” such as deciding upon questions that could bring the trial to a close. The Authority can pick three members to be on the commission, rather than the five required by court martial. All these “powers of the Appointing Authority . . . raise concerns that the commission’s decisionmaking may not be neutral.”\(^{39}\)

Kennedy echoes Stevens’s concern that post-conviction review as outlined by the DTA is not sufficient, both because it is not automatic and also because “the scope of that review is limited.” It “cannot correct for structural defects, such as the role of the Appointing Authority, that can cast doubt on the factfinding process and the presiding judge’s exercise of discretion during trial.” The Review Panel currently in place “lacks the structural protections designed to help ensure impartiality.” What’s more, “the Military Commission Order abandons the detailed Military Rules of Evidence.”\(^{40}\)

Agreeing with the majority on the above substantive points, Kennedy finds “no need to consider several further issues addressed in the plurality opinion” and

\(^{36}\) While there are sometimes justifications for departing from conventional procedures, “the circumstances of Hamdan’s trial present no exigency requiring special speed for precluding careful consideration of evidence. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantánamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.” 548 U.S. 557, 646 (2006) (Kennedy concurring).


\(^{40}\) Although such cases as Quirin, Kennedy concedes that there was “an amorphous evidence standard,” he argues that “the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of 10 U. S. C. § 836(b) as part of the UCMJ.” While “Congress can change” the current process, the Court “must apply the standards Congress has provided. By those standards the military commission is deficient.” 548 U.S. 557, 652 (2006) (Kennedy concurring).
Thomas’s dissent. Kennedy does not take sides on whether Common Article 3 “nec-
essarily requires that the accused have the right to be present at all stages of a crim-
ilal trial.” He also does not wish to decide whether secret evidence would deprive
Hamdan of a fair trial, noting that “[t]his fairness determination . . . is unambiguously
subject to judicial review under the DTA. He further avoids the question of whether
“Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding
the earlier decision by our Government not to accede to the Protocol.”

Kennedy ends with some advice for the administration on how to clean up the
process. “In light of the conclusion that the military commissions at issue are una-
thorized Congress may choose to provide further guidance in this era.” He sides
with the plurality on the illegitimacy of the commissions as they stand, but expresses
“no view on the merits of other limitations on military commissions described as
elements of the common law of war” in a later part in Stevens’s opinion.

The conservatives on the Court all dissented from the plurality and defended the
administration’s policy.

Scalia’s dissent argues that the DTA “unambiguously” stripped habeas jurisdiction
from the courts, that the effect applies to pending cases including Hamdan’s, and
that even if this is not the case “the jurisdiction supposedly retained should, in an
exercise of sound equitable discretion” – that is, deference to the administration –
“not be exercised.”

As of December 30, 2005, writes Scalia, “no court had jurisdiction to ‘hear or
consider’ the merits of the petitioner’s habeas application.” This follows from the
“ancient and unbroken line of authority [that] attests that statutes ousting jurisdiction
unambiguously apply to cases pending at their effective date.” Stressing his inter-
pretation of the literal meaning of the statute, Scalia says the “effective date” of the
law should be just that, the date on which it takes effect. Invoking Bruner v. United
States, Scalia avers that jurisdiction-stripping statutes apply to pending cases.

44 In Bruner v. United States (343 U.S. 112 [1952]), the Court granted certiorari and then held that an
intervening statute had stripped its jurisdiction because it “did not reserve jurisdiction over ‘pending
cases’.” Scalia argues that, contra Stevens, the “venerable rule that statutes ousting jurisdiction
apply to pending cases is not a ‘judge-made presumption against jurisdiction’” but rather a “simple
recognition of the reality that the plain import of a statute repealing jurisdiction is to eliminate the
power to consider and render judgment – in an already pending case no less than in a case yet to be
filed.” He argues that all the Court’s talk about the Detainee Treatment Act lacking a provision that
would retroactively strip jurisdiction from the courts is irrelevant, since “[p]rospective applications of a
statute are ‘effective’ upon the statute’s effective date” and that “an effective-date provision . . . renders
the statute applicable to conduct that occurs on the effective date and all future dates – such as the
Court’s exercise of jurisdiction here.” While Stevens writes in his opinion that Scalia “reads too much
into” the Bruner precedent but that “the Bruner rule has never been ‘an inflexible trump,’” Scalia
disagrees, citing the case’s rule as “an unqualified ‘rule,’ which ‘has been adhered to consistently by
this Court’” (citing 342 U.S. 112, 116 [1952]). And “[t]hough the Court resists the Bruner rule,” he
continues, “it cannot cite a single case in the history of Anglo-American law (before today) in which
Scalia rebuts Stevens’s argument that the DTA’s retroactive stripping of habeas jurisdiction cannot be inferred as implicit, given that it is explicitly asserted elsewhere in the legislation.45 Further, the DTA “confer[s] new jurisdiction (in the DC Circuit)” and should thus be seen as retroactive: “For better or for worse, our recent cases have contrasted jurisdiction-creating provisions with jurisdiction-ousting provisions, retaining the venerable rule that the latter are not retroactive even when applied to pending cases, but strongly indicating that the former are typically retroactive.”46 But about a statute that ousts and creates jurisdiction? Does DTA not do this, and should it thus not be seen as retroactive insofar as it is ousting jurisdiction?

At last on this point, Scalia argues that the obvious purpose of the DTA was to limit jurisdiction to the DC Circuit Court, and the Lindh “negative inference” used by Stevens to assume non-retroactivity “should not apply here to defeat the purpose of the very provision from which the negative inference is drawn.”47 Scalia, consistent with his usual rejection of using legislative history to guide decisions, pays little credence to Stevens’s argument that the legislative history of the DTA justifies the Courts’ interpretation. As to Stevens’s notion that the floor statements inserted into the congressional record “appear to have been inserted into the Congressional Record after the Senate debate,” he dismisses it with a bit of humor:

Of course this observation, even if true, makes no difference unless one indulges in the fantasy that Senate floor speeches are attended (like the Philippiics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes’ practice sessions on the beach) alone into vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.48

Scalia goes on to argue that the Senate debate is inconclusive on the meaning of the DTA, especially since at least one Senator did assume the pending cases would be covered by the Act. He questions the “drafting history [as a] legitimate or reliable . . . indicator of the objective meaning of a statute” and holds that “the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.”49

a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation.” 548 U.S. 557, 656–60 (2006) (Scalia dissenting).

45 Referring to Stevens’s argument that §1005(e)(2) and (e)(3) “are explicitly made applicable to pending cases (by §1005(h)(2),” but §1005(e)(1) wasn’t, Scalia writes, “[a] negative inference of the sort the Court relies upon might clarify the meaning of an ambiguous provision, but since the meaning of §1005(e)(1) is entirely clear, the omitted language in that context would have been redundant.” Scalia then rebuts Kennedy’s invocation of Lindh v. Murphy by arguing that in that case, the Court ruled against retroactively applying a revocation of habeas jurisdiction because there was no way to reconcile the alternative interpretation with what Congress intended by the AEDPA. 548 U.S. 557, 660 (2006) (Scalia dissenting).


Appendix G: Analysis of Hamdan v. Rumsfeld

Scalia laments that Stevens’s interpretation “transforms a provision abolishing jurisdiction over all Guantánamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.” It does make sense that Congress did not intend to preserve this jurisdiction.\(^{50}\)

Onto the question of the Suspension Clause, Scalia avers that since he “hold[s] that [the DTA] unambiguously terminates the jurisdiction of all courts to ‘hear or consider’ pending habeas applications, [he] must confront petitioner’s arguments that the provision, so interpreted, violates the Suspension Clause.” He cites Eisen-trager: “We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.”\(^{51}\)

He brushes off the precedent of Rasul and states that “it is clear that Guantánamo Bay, Cuba, is outside the sovereign ‘territorial jurisdiction’ of the United States. . . . [Hamdan], an enemy alien detained abroad, has no rights under the Suspension Clause.” But even if the Clause protects Hamdan, Scalia argues, the Court’s precedent has been to allow for “the substitution of a collateral remedy” if it is comparable to habeas. Scalia is unconvinced that “the postdecision exclusive review by the D. C. Circuit provided in [the DTA] is inadequate to test the legality of his trial by military commission.” Since the DC Circuit can test the commissions system after conviction, and since the Supreme Court can grant certiorari review of its determinations, habeas corpus has not been truly suspended for these aliens, even if they are entitled to it. Finally, Scalia responds to Stevens’s point that in Quirin the Court “expedited . . . review” instead of refraining from getting involved by arguing that “[c]ollateral application for habeas review was the only vehicle available,” whereas Hamdan can always wait for the DC Circuit to hear his case, assuming conviction.\(^{52}\)

But Scalia believes that even if the Court has the right to intervene in the Hamdan case, “neither this Court nor the lower courts ought to exercise it.” Essentially, because the president is waging the war on terror in good faith, the court system should leave him be. While Scalia concedes that the abstention precedent of “Councilman [the marijuana court martial case] does not squarely control petitioner’s case . . . it provides the closest analogue in our jurisprudence.”\(^{53}\)

The Court finds a general “inability on the Executive’s part here to satisfy the most basic precondition . . . for establishing military commissions: military necessity.”\(^{54}\)

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\(^{50}\) 548 U.S. 557, 669 (2006) (Scalia dissenting).


Scalia, in contrast, believes this is “quite at odds with the views on this subject expressed by our political branches.” Since Congress passed the AUMF and President Bush created the commissions, that is all there is to it. The Court should butt out. “If ‘military necessities’ relating to ‘duty’ and ‘discipline’ required abstention in Councilman . . . military necessities relating to the disabling, deterrence, and punishment of mass-murdering terrorists of September 11 require abstention all the more here.” On such matters, “the Executive’s competence is maximal and [the Court’s] is virtually non-existent.” Further, Scalia finds the DTA-granted jurisdiction to the DC Circuit to be plenty sufficient in terms of creating an independent review process, “if anything, a review scheme more insulated from Executive control than that in Councilman.”

In previous cases, the Court had “deferred exercising habeas jurisdiction” over state cases “until state courts have ‘the first opportunity to review’ a petitioner’s claim, merely to ‘reduce[e] friction between the state and federal court systems.’” As important as federalism might be, “[t]he ‘friction’ created today between this Court and the Executive Branch is many times more serious.” One might find it quite debatable whether the federal judiciary should have less to say about a federal executive detention than it does about a state-level conviction, already checked by a state court.

As in the other habeas cases, Thomas takes a hardline in favor of the administration. He accuses the Court of “openly flout[ing] our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs.” He considers “[t]he Court’s evident belief that it is qualified to pass on the ‘[m]ilitary necessity’ . . . of the Commander in Chief’s decision to employ a particular form of force against our enemies” to be “antithetical to our constitutional structure.”

Like Scalia, Thomas emphasizes the role of the political branches, defending “the President’s wartime exercise of his commander-in-chief authority in conjunction with the complete support of Congress.” He says, “[t]he Court has observed that [the commander in chief and related clauses] confer upon the President broad constitutional authority to protect the Nation’s security in the manner he deems fit.”

As with Hamdi, Thomas turns the principle of enumerated powers on its head, insisting that in the areas of war, national defense, and the like, “the fact that Congress has provided the President with broad authorities does not imply – and the Judicial Branch should not infer – that Congress intended to deprive him of particular powers not specifically enumerated.” Given that he is acting in his wartime capacity, “the

President’s decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference.” Citing Yamashita and other cases, Thomas argues that the power to create military commissions flows naturally from the president’s war powers.

While Stevens cites the rules set forth by the UCMJ, Thomas argues that this code’s “Article 21 presupposes the existence of military commissions under an independent basis of authorization.” This authorization comes from the AUMF. As for the conditions set forth by Winthrop’s treatise, Thomas believes “[t]he Executive has easily satisfied these considerations here.” The first two conditions are that a law-of-war military commission can only have jurisdiction over offenses committed on the battlefield of the conflict and during the time of the conflict. Thomas says the place of the conflict is Afghanistan and Pakistan, and the war goes back to 1996 when Osama bin Laden declared jihad on the United States. The third condition is that law-of-war commissions only have jurisdiction over “‘individuals of the enemy’s army who have been guilty of illegitimate warfare or other offences in violation of the laws of war.’” Presumably relying on the president’s say-so, Thomas asserts that “[t]his consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war.”

Thomas says the commissions have also satisfied the fourth condition, that the offense itself be recognized as a violation of the law of war, is easily satisfied, even if conspiracy lacks a strong precedent in practice in international law. “[T]his Court has recognized,” writes Thomas, “that the ‘jurisdiction’ of ‘our common-law war courts’ has not been ‘prescribed by statute,’ but rather ‘has been adapted in each instance to the need that called it forth.’” Furthermore, “the common law of war affords a measure of respect to the judgment of military commanders.” He returns to his fundamental partiality toward presidential war power and laments the “intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir.” The Court’s view that for military commissions, the precedent for whether an offense is triable “‘must be plain and unambiguous’” is, in Thomas’s mind, “a pure contrivance, and a bad one at that. . . . it is also inconsistent with the nature of warfare, which also evolves

60 Regarding the plurality’s view that Hamdan was not charged with an “overt act,” Thomas says “[t]he plurality’s willingness to second-guess the Executive’s judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority.” Concerning the argument that the AUMF came years after Osama declared Jihad, Thomas opines that “[t]he starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities.” He cites the World Trade Center bombing of 1993, the 1996 bombing of the Khobar Towers, the U.S. Embassy bombings in 1998, and the U.S.S. Cole attack in 2000 as examples of hostilities initiated before the AUMF. 548 U.S. 557, 683–5 (2006) (Thomas dissenting).


and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate.” This “common law of war establishes that Hamdan’s willful and knowing membership in al Qaeda is a war crime chargeable before a military commission.” In a footnote, Thomas ominously warns that “[u]nder the Court’s approach, the President’s ability to address this ‘new paradigm’ of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.” What’s more, “the common law of war cannot be ascertained from this Court’s failure to pass upon an issue, or indeed to even mention the issue in its opinion; rather, it is ascertained by the practice and usage of war.”

Notably, Thomas believes the “common-law of war” must be flexible, but the common law of habeas corpus should be stunted to where it was in 1789. With war and technology, precedent and practice have significantly changed in the two centuries since American Independence. The U.S. government can, within hours, capture someone anywhere on the globe. The president’s effective wartime powers and reach have vastly grown since 1789. But the courts’ ability to keep up with the president must stay frozen forever. This is a peculiar point of view, especially considering that the common law was by its nature an evolving body of law in the judiciary and preexisted the Constitution, whereas presidential war powers are circumscribed by the presidency’s Article II enumerated powers. The presidency was created by a Constitution that already presupposed an evolving common law, including an evolving writ of habeas corpus. Thomas’s overall approach here appears to be at odds with the Constitution as it actually came to be.

According to Thomas, Hamdan’s association with bin Laden and al Qaeda’s alleged acts of terrorism are all that’s needed: “These allegations, against a confirmed unlawful combatant, are alone sufficient to sustain the jurisdiction of Hamdan’s military commission.” But how do we know he is in fact an “unlawful combatant”? According to Thomas, merely being a member of the group is enough, as was established with the Nuremberg Trials and tribunals for the Lincoln assassins.

Thomas writes, “Helmut Poppendick was convicted [in Nuremburg] of no other offense than membership in a criminal organization and sentenced to a 10-year term of imprisonment . . . This Court denied habeas relief” (citing 333 U.S. 836 (1948)). The history of U.S. wars “establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission.”

“[I]n the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had ‘combin[ed], confederat[ed], and conspir[ed] . . . to kill and murder’ President Lincoln.” The other more pedestrian cases of the era also saw commissions taking an evolutionary approach to the common law of war, says Thomas, helping to “establish[sh] that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both.”


“The plurality’s approach,” Thomas continues, “requires that any overt act to further a conspiracy must itself be a completed war crime distinct from conspiracy – which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war.” But is the view Thomas seems to have not similarly circular? If conspiracy is itself a violation of the law of war, and if it constitutes the plan to commit a violation, it would seem that the definition of conspiracy itself rests on circular reasoning.

In explaining why a departure from conventions is warranted, Thomas appeals to the argument that it is a new kind of war:

We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers.68

This “new and deadly enemy” requires that the president be deferred to on the way he carries out “defense” policy, including with military commissions. Interestingly, he next draws an analogy from which we can reasonably draw a conclusion different from his:

Those Justices who today disregard the commander-in-chief’s wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency’s wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See Rapanos v. United States, 547 U.S. __ (2006). It goes without saying that there is much more at stake here than storm drains.69

Indeed, what’s at stake here is much more than storm drains. It is the ancient writ of habeas corpus and the ancient tendency of the executive to detain people without any oversight.

Thomas denies Kennedy’s argument that the commissions do not satisfy the ACMJ.70 He finds the Geneva Convention unenforceable by the Court71 and argues

70 Thomas takes on Kennedy’s argument that the rule that commissions should have uniformity of procedures with courts martial “insofar as practicable” means that the Court, not just the president, can weigh in on whether it is practicable. Thomas is unconvinced, returning both to the president’s authority to create military commissions but also to the argument that the uniformity rule “is nothing more than uniformity across the separate branches of the armed services.” He goes on to argue that court martial regulations in the UCMJ do not apply here. It is up to the president to set the rules for military commissions, the justice reiterates. 548 U.S. 557, 710–1 (2006) (Thomas dissenting).
71 Thomas cites Eisentrager to say the Convention does not protect Hamdan. He says the plurality is arguing that Article 21 of the UCMJ “selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common
that Common Article 3 is inapplicable since it only applies to conflicts “not of an international character,” such as civil wars. This is the president’s interpretation, which Thomas says the Court should defer to, although he concedes that the Court’s interpretation is “admittedly plausible.” But between “two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive’s interpretation.”

On the question of whether Hamdan’s Convention, in line with Geneva, provides “all the judicial guarantees which are recognized as indispensable by civilized peoples,” and specifically on whether Hamdan’s exclusion from proceedings and evidence taints the process, Thomas responds that under the president’s procedures, “the Government may not impose such bar or denial on Hamdan if it would render his trial unfair, a question that is clearly within the scope of the appellate review contemplated by regulation and statute.” So because Hamdan will be able to appeal his conviction on grounds of unfairness, the process should be left alone for now.

Thomas cites the administration’s assertions that its detention policy is necessary for intelligence and national security, and cites a 1964 decision as precedent for deferring to the executive: “[T]his Court has concluded, in the very context of a threat to reveal our Nation’s intelligence gathering sources and methods, that ‘[i]t is “obvious and unarguable” that no governmental interest is more compelling than the security of the Nation.’” On this basic point Thomas rests: The president is the commander in chief during wartime, and the Court should not interfere with his conduct of national security policy.

Justice Alito’s dissent is short and more or less in line with Scalia’s and Thomas’s. “I see no basis,” Alito writes, “for the Court’s holding that a military commission cannot be regarded as ‘a regularly constituted court’ unless it is similar in structure and composition to a regular military court or unless there is an ‘evident practical need’ for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted.” He hammers away at some details held by the Court, such as the applicability of language regarding tribunals in the Fourth Geneva Convention’s Article 66 to other language in Common Article 3.

One of his most interesting arguments is that even if the processes of the military commissions, as spelled out by the Military Commission Order, were illegitimate, it doesn’t follow that the commissions themselves are. District courts, creations of Congress, might have illegitimate processes spelled out for them. But “[i]f Congress enacted a statute requiring the federal district courts to follow a procedure that is

Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely the Conventions’ exclusive diplomatic enforcement scheme,” which would preclude the courts from enforcing the Conventions. He sees no good argument for this “selective incorporation.”

unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to outlaw the commissions.”

But it would seem that if the fundamental function of the court were illegitimate, if the court’s very creation rested on constitutionally illegitimate premises, then the mere existence of the court would be questionable.

Responding to Kennedy’s argument that the commissions must be sufficiently independent to be valid, Alito argues that “the commission in Quirin was certainly no more independent from the Executive than the commissions at issue here.” Finally, like the other dissenters, he argues that if there is something actually unfair about Hamdan’s military commission trial, he can take it up in the appeals process.

At center in Hamdan was a fundamental issue regarding the president’s detention policies. The questions struck to the heart of the Constitution: habeas corpus, presidential authority, the separation of powers and military policy. While seen as a dramatic repudiation of the administration’s policy, it turned on some specific questions that, truth be told, did have some ambiguity as to their answers: whether the commissions were legally constituted; whether they followed the laws of war; what offenses, which people, and over which territory they had authority; whether the Geneva Convention applied to the war on terror or al Qaeda and whether they were enforceable by the Court; whether the Court should enforce the Convention even if it could; what the president’s authority was under the AUMF; whether the DTA actually stripped habeas corpus jurisdiction from the court system, whether this stripping would be retroactive, whether it would constitute a formal suspension of habeas corpus, and whether that suspension would be constitutional or not.

By invoking the argument that habeas corpus was not suspended even if it was stripped from the courts’ toolbox, Scalia, Thomas, and Alito relied on the idea that post-conviction scrutiny by the courts satisfied the habeas corpus clause in the Constitution, and also that it would satisfy the UCMJ and the Geneva Convention. This opens up questions on the role of habeas corpus after conviction as opposed to before. Since habeas at the time of the Constitution’s ratification was mostly seen as a pre-trial, rather than post-trial, remedy, there is a flaw in the argument that the Suspension Clause is satisfied so long as the post-trial habeas remedy, or its equivalent, is kept in place. Also, there is an apparent tension between the idea that the process in question is legal under the Suspension Clause and that the Suspension Clause does not apply at all to the process in question, an argument that emerges in the Boumediene case.

Another fascinating aspect here is the extent to which all the arguments, as technical as they were, seemed to fall into two camps: those that held that the president was to be deferred to, especially when Congress appeared to be deferring to him; and those that held the Court had a very important and active role in checking even his wartime detentions.

However dramatic it was for the plurality to reject Bush’s military commissions, the degree to which they relied on technicalities, and especially on the language of the DTA, would render the decision vulnerable to be effectively made moot by what the president decided to do next: go to Congress, exactly as his critics dared him to do, and ask for a statutory approval of his military commissions.
Appendix H

Analysis of Boumediene v. Bush

Justice Kennedy delivered the opinion of the Court, joined by Stevens, Souter, Ginsburg, and Breyer. Souter filed a concurring opinion, joined by Ginsburg and Breyer. Roberts issued a dissent joined by Scalia, Thomas, and Alito, and Scalia also filed a dissent joined by Roberts, Thomas, and Alito.

In the process of making this decision upholding the extension of constitutional common-law habeas to Guantánamo, the majority came to conclusions with potentially far-reaching implications, yet at the same time discussed the case narrowly enough, with a focus on the specific circumstances at hand, such that the extent of these implications is truly yet to be known. Since the main question at hand pertained to the constitutional privilege of habeas corpus – not simply a statutory privilege – the Court had to inspect the meaning of habeas as it existed as a common law writ in America at the time of the adoption of the Constitution, while also examining the peculiar situation before them.

Kennedy overviewed the history of this particular controversy, going back to the Authorization for Use of Military Force (AUMF) and the Court’s decision in Hamdi that the AUMF indeed empowered the president to detain individuals in the war on terror. He reviewed the creation of the Combatant Status Review Tribunals (CSRTs), the Rasul decision affirming the right of statutory habeas for detainees at Guantánamo, and the Hamdan decision calling upon the president to enlist Congress in the creation of a process to guarantee minimum due process safeguards for detainees.

Kennedy briefly and convincingly determines that the Military Commissions Act (MCA) was indeed intended to strip habeas jurisdiction from the courts, that “[t]here is little doubt that the effective date provision” designating September 11, 2001, as the starting point of the removal of jurisdiction “applies to habeas corpus actions.” Since “the MCA was a direct response to Hamdan’s holding that the Detainee Treatment Act’s (DTA’s) jurisdiction-stripping provision had no application to pending cases,” the relevant question is the validity of this MCA language. In passing the
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MCA – and this is the most important part of the decision – Congress “acted in violation of the Suspension Clause.”

To come to this conclusion, Kennedy explores the history of the writ. Noting that “the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights” and that “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty,” Kennedy delves into the English and pre-constitutional history that guided the framers of the Constitution. The justice explains that the principle against unlawful confinement went back to the Magna Carta, and that the writ, while “in its earliest use was a mechanism for securing compliance with the King’s Laws,” eventually became a principal tool of liberation against the king’s own power. He reviews Darnel’s Case and the Parliamentary efforts to codify the common law writ culminating in the Habeas Corpus Act of 1679 and explains that “[t]his history was known to the Framers.” He cites opinions of Framers around the time of the Constitution’s adoption, as well as the extreme abuses in England upon suspending the writ, and concludes that “the Suspension Clause is designed to protect against these cyclical abuses.” At the very least, “the Clause protects the writ as it existed when the Constitution was drafted and ratified.”

As for whether the common law writ of habeas would have applied to aliens outside of the nation’s sovereign territory, Kennedy cannot come to any final conclusions. While the “Government argues the common-law writ ran only to those territories over which the Crown was sovereign,” the “[p]etitioners argue that jurisdiction followed the King’s officers.” Yet “[i]n none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used” in the cases before the Court.

While “common-law courts granted habeas corpus to prisoners detained in the exempt jurisdictions” of England, “these areas . . . were nonetheless under the Crown’s control.” British courts issued the writ to non-citizens in India, but these were British courts geographically located there, and “no federal court sits at Guantánamo.” On the other hand, while, as the government argues, habeas did not reach “Scotland and Hanover, territories that were not part of England but nonetheless as controlled by the English monarch.” This control, the government maintains, is analogous to American control of Guantánamo. But Kennedy writes that “the common-law courts’ refusal to issue the writ to these places was motivated not by formal legal constructs but by what we would think of as prudential concerns.” Scotland had its own “foreign” legal system that would make establishment of common-law practices there a logistical difficulty: at Guantánamo, there is no legal system in place other than America’s.

These difficulties prompt Kennedy to construct a somewhat novel theory of habeas jurisdiction. He concedes that “Guantanamo Bay is not formally part of the United States” and that, under the law, “Cuba retains ‘ultimate sovereignty’ over the territory while the United States exercises ‘complete jurisdiction and control.’” While the “United States contends . . . that Guantanamo is not within its sovereign control . . . it is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another.” While the U.S. does not maintain de jure sovereignty, Kennedy contends that “we would be required . . . to accept the Government’s premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction” to find that habeas does not reach to the territory.4

Historically, Congress had, by statute, extended habeas corpus to territories it acquired, and thus it was not originally necessary “to test the limits of the Suspension Clause” concerning such territories. However, in the Insular Cases (1901–1903) – regarding the power of the Constitution in the territories won in the Spanish-American War – the Court had determined whether the “Constitution, by its force, applies in any territory that is not a State,” and concluded that it did. The Court found that the “risk [of] uncertainty and instability that could result from a rule that displaced altogether the existing legal systems.” Therefore, the “doctrine of territorial incorporation,” a theory concerning the extent to which the Constitution applied to territories not soon slated for statehood, did in fact apply. Considering the statements of judges on the Court deciding on Reid in the 1950s, Kennedy decides that the degree of constitutional applicability over such territories must be determined on a case-by-case basis, depending on the particular circumstances – geography, legal tradition of the territory, and what the intended fate of that territory was in respect to the Union.5

Looking at Eisentrager (1950), the case wherein the Supreme Court denied habeas corpus relief to a German who had been detained and convicted in occupied Germany, Kennedy finds that practical considerations were decisive there as well: “the Court sought to balance the constraints of military occupation with constitutional necessities.” Kennedy denies that the only relevant factor was that the detainee in Eisentrager was a non-citizen detained outside technical U.S. sovereignty: “the United States lacked both de jure sovereignty and plenary control over Landsberg Prison” in Germany, and the “Justices who decided Eisentrager would have understood sovereignty as a multifaceted concept.”6 But unlike in Eisentrager, Kennedy notes that the Boumediene petitioners deny their status as “enemy combatants,” the United States has more effective control over the jurisdiction in question, and there

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6 The 1950 decision’s “discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg. . . . [N]othing in Eisentrager says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.” The “common threat uniting the Insular Cases, Eisentrager, and Reid [is] the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” 553 U.S. 756, 763–4 (2008).
is no conflict with a local sovereign government. While *Eisentrager* supports the idea of territorial incorporation on a case-by-case basis, Kennedy finds the jurisdictional reach of the Court to be different in each case.\(^7\)

A more “formal sovereignty-based test raises troubling separation-of-powers concerns,” continues Kennedy. “The United States has maintained complete and uninterrupted control of the bay for over 100 years. . . . The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal restraint.” This would in effect allow the president and Congress “to switch the Constitution on or off at will.” This would be especially unsettling concerning habeas corpus, since the writ is “itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.”\(^8\)

Kennedy goes on to address the DTA process, finding that it is not “an adequate substitute” for habeas. While the DTA process had not been scrutinized by the Court of Appeals, which instead determined the whole matter was outside its jurisdiction, Kennedy decides to retreat from the Court’s usual “practice of declining to address issues left unresolved by earlier proceedings” because it “is not an inflexible rule” and “[t]he gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.”\(^9\)

To bolster the case that the DTA did not offer an adequate habeas substitute, Kennedy points to the context in which it was passed – with the purpose of abolishing habeas jurisdiction. Looking at Congress’s historical tendency “not to contract the writ’s protection but to expand it or to hasten resolution of prisoners’ claims” – explaining the exception of the Anti-Terrorism and Effective Death Penalty Act as pertaining to federal review of state convictions, rather than review of executive

\(^7\) The practical differences between *Eisentrager* and *Boumediene* are crucial, Kennedy concludes. Whereas the *Eisentrager* petitioners never contested their status as “enemy aliens” and were convicted, the detainees in *Boumediene* do contest their status, and have not been convicted. And “[u]nlike its present control over” Guantánamo, “the United States’ control over the prison in Germany was neither absolute nor indefinite” but rather “under the jurisdiction of the combined Allied Forces. Kennedy further argues that the resources needed to apply habeas corpus at Guantánamo do not constitute an undue imposition and that civilian courts have at times functioned alongside military courts. The justice denies that a habeas corpus writ would endanger national security – since the detainees, “dangerous as they may be if released . . . are contained in a secure prison facility located on an isolated and heavily fortified military base.” There is no conflict with a local territorial government, since “[n]o Cuban court has jurisdiction” there. Indeed, the United States has “complete and total control” over the base. Hence, the Suspension Clause “of the Constitution has full effect at Guantánamo Bay” and “Congress must act in accordance with the requirements of the Suspension Clause.” The MCA has not legally suspended the writ for the detainees, who therefore “are entitled to the privilege of habeas corpus to challenge the legality of their detention.” 553 U.S. 723, 763–71 (2008).

\(^8\) 553 U.S. 723, 764–6 (2008).

detention before trial – Kennedy finds that, unlike the other times Congress has legislated on habeas, “the DTA and the MCA... were intended to circumscribe habeas review.” “If Congress had envisioned DTA review as coextensive with traditional habeas corpus, it would not have drafted the statute” in the manner it did, and the “unequivocal nature” of the MCA’s “jurisdiction-stripping language” makes it clear that that was its purpose. Also, because the DTA gave the Court of Appeals exclusive jurisdiction over the detainees’ cases, rather than allowing “any justice” to scrutinize the detention, the clear intention was for the Court of Appeals “to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings.”

But the question arises: What would constitute an adequate habeas corpus substitute? Here, Kennedy is not very helpful: “We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.” However, “we do find it uncontroversial... 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.”

Kennedy does offer some more hints as to what must be involved in a habeas corpus proceeding or its substitute. Noting that “common-law habeas corpus was, above all, an adaptable remedy” whereby the “court’s role was most extensive in cases of pretrial and noncriminal detention,” Kennedy implies a fairly robust writ is appropriate here. Whereas in examining convictions in courts of record, the Court has shown deference to lower judicial decisions out of a respect for federalism and because “the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal,” in the Boumediene case, “the detention is by executive order,” meaning that “collateral review is most pressing.” Echoing the modern reasoning of the Court in weighing between habeas corpus rights and the presence of other remedies, Kennedy insists that “[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.”

Kennedy mentions a few rights the detainee should have: the “ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant,” made more important since the detainee has no attorney at the time of a CSRT and “given that there are in effect no limits on the admission of hearsay evidence.” What’s more, “there is a considerable risk of error in the tribunal’s findings of fact” and “the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more.”

Next comes the question as to whether the DTA in fact deprives detainees of rights guaranteed by the Constitution. Kennedy considers the possibility that the DTA allows such fundamental rights as the right to argue “that the President has no authority under the AUMF to detain them indefinitely” and the “opportunity... to

present relevant exculpatory evidence that was not made part of the record in the
earlier proceedings.” He finds “no language in the DTA that can be construed to
allow the Court of Appeals to admit and consider newly discovered evidence” and
notes that “[t]his is not a remote hypothetical. One of the petitioners, Mohamed
Nechla, requested at his CSRT hearing that the Government contact his employer,”
who became available, according to the petitioner, after the CSRT. There is also “no
mechanism for ensuring that” evidentiary procedures established by the secretary
of defense under Congress’s direction are being followed. Finally, and perhaps
most important, “To hold that the detainees at Guantanamo may, under the DTA,
challenge the President’s legal authority to detain them, contest the CSRT’s findings
of fact, supplement the record on review with exculpatory evidence, and request an
order of release would come close to reinstating the §2241 habeas corpus process
Congress sought to deny them.”

Finally, Kennedy considers some of the potential practical obstacles to habeas
review as well as the prudential reasons that the Court might not intervene. He finds
the exhaustion principle not to apply to this executive detention, but does concede
it “likely would be both an impractical and unprecedented extension of judicial
power to assume that habeas corpus would be available at the moment the prisoner
is taken into custody. . . . Our holding with regard to exhaustion 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.” But this is far from the circumstance
here: “In some of these cases six years have elapsed without the judicial oversight
that habeas corpus or an adequate substitute demands.” All the Court is deciding,
Kennedy writes, is that “the petitioners before us are entitled to seek the writ; that
the DTA review procedures are an inadequate substitute for habeas corpus; and that
the petitioners in these cases need not exhaust the review procedures in the Court
of Appeals before proceeding with their habeas actions in the District Court.” MCA
§7 is unconstitutional, but “the DTA and the CSRT process remain intact,” and the
“courts should refrain from entertaining” a habeas case until a CSRT has transpired,
“[e]xcept in cases of undue delay.”

The decision agrees that there is a “legitimate interest in protecting sources and
methods of intelligence gathering” and trusts that District Courts will use discretion
in such areas. While the United States’ “past military conflicts have been of limited
duration, it has been possible to leave the outer boundaries of war undefined . . . the
Court might not have this luxury” in a state of indefinite war. While national
security deserves deference, “[s]ecurity subsists, too, in fidelity to freedom’s first
principles. Chief among these are freedom from arbitrary and unlawful restraint
and the personal liberty that is secured by adherence to the separation of powers. . . .
Liberty and security can be reconciled; and in our system they are reconciled within

the framework of the law. The Framers decided that habeas corpus, a right of first
importance, must be a part of that framework, a part of that law.”

Souter issued a very brief concurrence, joined by Ginsburg and Breyer. He con-
tends that the question of constitutional habeas corpus jurisdiction at Guantánamo,
while technically a novel subject now before a court, was substantively addressed
already in Rasul, which directly addressed the statutory reach of habeas.

Chief Justice Roberts, joined by Scalia, Thomas, and Alito, issued a very interesting
dissent. In it, he mostly argues that the Supreme Court was not being very helpful:

Today the Court strikes down as inadequate the most generous set of procedural
protections ever afforded aliens detained by this country as enemy combatants. . . .
The Court rejects them today out of hand, without bothering to say what due process
rights the detainees possess, without explaining how the statute fails to vindicate
those rights, and before a single petitioner has even attempted to avail himself of
the law’s operations. And to what effect? The majority merely replaces a review system
designed by the people’s representatives with a set of shapeless procedures to be
defined by federal courts at some future date.

Arguing that the detainees had it at least just as well before the decision, Roberts
says “this decision is not really about the detainees at all, but about control of federal
policy regarding enemy combatants.” Since habeas corpus “is more fundamentally
a procedural right . . . the critical threshold question . . . is whether the system
the political branches designed protects whatever rights the detainees may possess.”

The DTA process, he continues, was never properly scrutinized. “The majority
instead compares the undefined DTA process to an equally undefined habeas right –
one that is to be given shape only in the future by district courts on a case-by-case
basis.” In the end, “the habeas corpus process the Court mandates will most likely
end up looking a lot like the DTA system it replaces. . . . All that today’s opinion
has done is shift responsibility for those sensitive foreign policy and national security
decisions from the elected branches to the Federal Judiciary.”

The Circuit Court appropriately refused to intervene “until the D.C. Circuit
had assessed the nature and validity of the congressionally mandated proceedings.”
Under the status quo ante, the Circuit Court would have been able to inspect them,

17 Writes Souter: “[N]o one who reads that the Court’s opinion in Rasul could seriously doubt that
the jurisdictional question must be answered the same way in purely constitutional cases, given the
Court’s reliance on the historical background of habeas generally in answering the statutory question.”
Thus, although Scalia’s dissent responds to the decision as a completely unprecedented retreat from
established practice, Souter insists that “whether one agrees or disagrees with today’s decision, it is no
bolt out of the blue.” He further rebuts Roberts’s plea that the Court should have deferred until after
the DTA process had a chance to play out, since “some of the prisoners here today hav[e] been locked
but the Supreme Court has now disrupted this process: The Court “not only denies the D.C. Circuit the opportunity to assess the statute’s remedies, it refuses to do so itself: the majority expressly declines to decide whether the CSRT procedures, coupled with Article III review, satisfy due process.”

Citing Hamdi, Roberts notes that “the plurality specifically stated that constitutionally adequate collateral process could be provided ‘by an appropriately authorized and properly constituted military tribunal’” given the extreme circumstances of war. Because Hamdi was an American citizen, and “the Due Process Clause does not afford non-citizens in such circumstances greater protections than citizens are due,” the only pertinent question should be whether “the CSRT procedures meet the minimal due process requirements outlined in Hamdi, and if an Article III court is available to ensure that these procedures are followed in future cases. . . . The question of the writ’s reach need not be addressed.” Roberts chides the majority “for razing a system that it admits may in fact satisfy the Due Process Clause and be ‘structurally sound.’”

The chief justice then argues that the exhaustion principle should apply here, since we do not in fact know what the other remedies would have concluded, and invokes the time-honored principle that the Court avoid overruling statutes as unconstitutional unless it absolutely has to in order to reach its decision. In responding to Kennedy’s argument that the “gravity” of the situation warrants an unusual approach, he insists that “[a] principle applied only when unimportant is not much of a principle at all.” He considers the decision “judicial activism.”

As for the majority’s notion that habeas intervention is appropriate to avoid “undue delay,” Roberts rebuts this notion, seemingly on behalf of the very detainees the existence of whose constitutional rights he questions:

On the contrary, the system the Court has launched (and directs the lower courts to elaborate) promises to take longer. The Court assures us that before hearing their habeas petitions, detainees must usually complete the CSRT process. . . . Then they may seek review in federal district court. Either success or failure there will surely result in an appeal to the D.C. Circuit – exactly where the judicial review starts under Congress’s system. The effect of the Court’s decision is to add additional layers of quite possibly redundant review. . . . If the majority were truly concerned about delay, it would have required petitioners to use the DTA process that has been available to them for 2½ years.

Roberts finds a contradiction in the majority’s reasoning here: “The majority strikes down the statute because it is not an ‘adequate substitute’ for habeas review . . . but fails to show what rights the detainees have that cannot be vindicated by the DTA

system.” Article III court review is “the central purpose of habeas corpus” and the Court’s indication in Hamdi was that U.S. citizens at least receive minimal processes in a military tribunal reviewable by an Article III court. “That is precisely the system we have here.”25

The chief justice argues that the DTA process is not the only part of judicial determination process, because CSRTs are not where their designation as enemy combatants occurs, but rather where detainees can first challenge that status. Indeed, Roberts considers the CSRTs themselves a process of collateral review. This could be seen as a weaker argument than some of the ones above, since CSRTs are not independent collateral reviews in the sense that federal court review would be. But more convincing is his point that “the Hamdi plurality concluded that this type of review would be enough to satisfy due process, even for citizens… Congress followed the Court’s lead, only to find itself the victim of a constitutional bait in switch.” Even more compelling is his critique of the general situation: “the majority now finds itself in the position of evaluating whether the DTA system is an adequate substitute for habeas review without knowing what rights either habeas or the DTA is supposed to protect.”26

Regarding the scope of rights protected by the Suspension Clause, Roberts argues that the clause at least protects the common-law writ as it existed at the time of the Constitution’s adoption, but that the Court has conceded that the writ plausibly never extended to prisoners of war. In terms of the objection that CSRTs allow hearsay evidence, Roberts points out that Hamdi made an allowance for such evidence. He talks about the threats on the battlefield and the difficulty of ensuring domestic-style due process during war but does not really address the fact that the Guantánamo detainees have not been on the battlefield for years, and that such process would be easier to ensure than in the heat of conflict. The chief justice complains about the majority’s disrespect for the sensitivity of classified information. He laments the Court’s decision to declare a statute’s language unconstitutional when he does not think it was necessary to do so.27


27 Roberts says that any constitutional problem with the CSRT process could have been adjudicated by the Circuit Court, which also has the stipulated power to remand a case for a new CSRT hearing. The Defense Department regularly reviews the cases, and a new CSRT can be called if new exculpatory evidence is brought to light. Ultimately, any problematic ambiguity as to the scope of DTA review and remedy applies to habeas review as well. Insofar as constitutional or statutory habeas allows for the release of unlawfully detained persons, so too could it be interpreted to be authorized by DTA. “The D.C. Circuit can . . . order release, the CSRTs can order release, and the head of the Administrative Review Boards can, at the recommendation of those panels, order release.” But the majority, he accuses, has assumed what it has set out to prove: “[A]ny interpretation of the statute that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas.” He notes that under current law, the detainees already have the “ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process.” 553 U.S. 723, 820–5 (2008) (Roberts dissenting).
Roberts sums up his objections:

So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit – where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to “determine – through democratic means – how best” to balance the security of the American people with the detainees’ liberty interests [as called for in Hamdan] has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. . . . And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.”

Justice Scalia’s dissent, joined by Roberts, Thomas, and Alito, struck a different tone and made distinct points. All four dissenting justices agreed with both dissents, and although they were largely complementary, as is discussed in the following paragraphs, there is perhaps a tension between them.

Scalia begins by describing what he considers the precedent-shattering nature of the question: “Today, for the first time in our nation’s history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.” Although he agrees with Roberts that “the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ,” his objection “is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely ultra vires” – beyond the proper powers of the Court.

He begins the first part of his decision by summing up what he regards as “the disastrous consequences” unleashed by the decision. “America is at war with radical Islamists,” Scalia writes, summarizing the conflicts between the United States and Muslim terrorists going back to the 1990s, culminating in 9/11. “The game of bait-and-switch today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional republic,” but alas, he intones, it is indeed an “abandonment of such a principle that produces the decision today.”

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30 553 U.S. 723, 827–8 (2008) (Scalia dissenting). Interestingly, Scalia calls the president “the Nation’s Commander in Chief,” even though in “our constitutional republic” the president is only the commander in chief of the armed forces “when called into the actual Service of the United States”
In supporting his case that the release of prisoners, which he implies will happen more recklessly, he argues that “in the short term... the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. . . . In one case, a detainee released... masterminded the kidnapping of two Chinese dam workers, one of whom was later shot to death. . . . Another... promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers.”

Mark Denbeaux’s work has shown the recidivism rate to be not nearly as high as Scalia asserts. What’s more, Scalia then goes on to stress that these released prisoners were “detainees whom the military had concluded were not enemy combatants” – which raises the question as to why he is using the military’s alleged disastrous decisions about whom to release as an argument that the military should continue to have prerogative in the area. As if to rebut this, he argues that the extension of habeas corpus will “impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of enemy returned to combat will obviously increase.” But is this so certain? He takes it for granted.

Justice Scalia then switches gears somewhat to complain, as Roberts does, about the Court’s “bait and switch.” In *Hamdan*, the Court had said that “Nothing prevents the President from returning to congress to seek the authority [for trial by military commission] he believes necessary.” “Turns out they were just kidding,” Scalia intones. Congress passed the MCA, “emphatically reasserting that it did not want these prisoners filing habeas petitions.”

The Justice responds to the majority’s assertion that the government has not advanced any “credible arguments” as to why habeas should not reach Guantánamo, asking “What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever.” And since, as he argues, the Suspension Clause does not protect enemy aliens detained abroad, there is no reason to rule on the constitutionality of the MCA.

Whereas Roberts concedes that the Suspension Clause protects habeas “at least” as far as the common-law writ was understood at the time of ratification, Scalia is adamant that the “writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written. . . . And if the

("Constitution of the United States," Article II, Section 1). He continues that the whole point of creating Guantánamo was to avoid the reach of habeas corpus, which he considers lawful and sound: “Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan” or elsewhere. This “might well have been worse for the detainees themselves.”

34 Citing 548 U.S. 557 636 (2006), parenthetical Scalia’s.
understood scope of the writ of habeas corpus was ‘designed to restrain’ (as the Court says) the actions of the Executive, the understood limits upon that scope were (as the Court seems not the grasp) just as much ‘designed to restrain’ the incursions of the Third Branch.”

For Scalia, the most pressing question for habeas’s reach to aliens concerns geography: Invoking Eisentrager, Ex parte Quirin, and In re Yamashita, Scalia writes, “Lest there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a habeas court of an alien, Justice Jackson distinguished two cases in which aliens had been permitted to seek habeas relief, on the grounds that the prisoners in those cases were in custody within sovereign territory of the United States... Eisentrager thus held – held beyond any doubt – that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.” In a footnote, he argues that Kennedy’s distinction between “de-facto” and “de-jure” sovereignty “does not explain why the writ never issued to Scotland, which was assuredly within the de facto control of the English crown.” But Kennedy’s decision does in fact explain this in terms of the legal system in Scotland being completely alien to the English common law system, whereas there is no competing jurisdiction under a foreign power, with different legal practices, operating at Guantánamo. As for Kennedy’s argument that Eisentrager seems to hinge on practical considerations, not formalistic ones, Scalia says these concerns were only “cited... to support [the Court’s] holding that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad in any circumstances.”

One nitpick with Scalia’s language here: As far as habeas corpus goes, the Constitution did not “empower” courts at all. This was discussed in Chapter 3 when habeas corpus was a common-law writ, and was respected throughout the colonies and states before the Constitution was adopted. It is true that it is the Constitution that brings into existence the federal courts, and thus empowers them, but we would have to assume that habeas corpus was originally meant to be preserved as a federal power by the Suspension Clause. This assumption is unwarranted, but in the context of the appropriate role of federal courts alone, within a vacuum, Scalia has a valid point.

In a footnote, Scalia addresses Souter’s concurrence that Rasul should be read to imply habeas reaches to Guantánamo, pointing out that “Rasul was devoted primarily

\[553 \text{ U.S.} 723, 832–4 (2008) (Scalia dissenting).\]

If all four dissenting judges agree that the constitutional reach of habeas is “at least” what it was at the time of the Constitution but also “not possibly... farther,” that means they all agree that the reach is exactly what it was. Why not say that?

\[553 \text{ U.S.} 723, 835 (2008) (Scalia dissenting).\]

\[553 \text{ U.S.} 723, 835, \text{FN} 3 (2008) (Scalia dissenting).\]

\[553 \text{ U.S.} 723, 749–53 (2008).\]

\[553 \text{ U.S.} 723, 836 (2008) (Scalia dissenting).\]
to an explanation of why *Eisentrager’s* statutory” – rather than constitutional – “holding no longer controlled.”

Justice Scalia addresses Kennedy’s treatment of the Insular Cases by saying they all involved sovereign U.S. territory. Kennedy had cited *Eisentrager’s* citation of *Balzac v. Porto Rico,* saying that the latter had been concerned with the extent of constitutional protection to these territories, rather than whether there was any at all. “But the Court,” argues Scalia, “conveniently omits *Balzac’s* predicate to that statement: ‘The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted.’” Scalia concludes that “None of the Insular Cases stands for the proposition that aliens located outside sovereign U.S. sovereign territory have constitutional rights.”

Whereas the majority indicates that *Eisentrager* concerns post-conviction remedy, and the detainees at Guantánamo had not enjoyed that full process and so probably have a better case for collateral relief, Scalia turns it around: “The difference between them cries out for lesser procedures in the present cases. The prisoners in *Eisentrager* were *prosecuted* for crimes after the cessation of hostilities; the prisoners here are enemy combatants *detained* during an ongoing conflict.” And he reiterates that the Court had already “suggest[ed]” in *Hamdi* that “the use of a tribunal akin to a CSRT to authorize the detention of American citizens as enemy combatants” would have been “an adequate substitute for habeas corpus.” It is worth noting that Scalia, however, strongly dissented in *Hamdi* because he did not believe the process suggested by the Court plurality was sufficient at all. However, he is internally consistent – unlike Thomas, for example – insofar as the key distinction that he draws is the citizenship status of the detainee. While his position is more coherent than perhaps anyone on the Court as it regards these different detentions, his use of this argument, while validly challenging the logic of the majority, does seem to have a bit less weight coming from the man who was so clearly flabbergasted by *Hamdi.*

“The category of prisoner comparable to these detainees are not the *Eisentrager* criminal defendants, but the more than 400,000 prisoners of war detained in the United States alone during World War II. Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court.” But prisoners of war do get the privileges of the Geneva Convention, which Scalia appears to have considered inappropriate from his joining dissent in *Hamdan,* which explicitly argued that Hamdan’s Geneva Convention claims are “foreclosed by *Johnson v.*

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42 553 U.S. 723, 838, FN4 (Scalia dissenting).
43 258 U.S. 298 (1922).
44 Citing 258 U.S. 298, 312 (1922).
45 553 U.S. 723, 839 (Scalia dissenting). In addressing the majority’s argument concerning *In re Ross* and its conclusion that the case did not turn entirely on citizenship, Scalia asks, “What, exactly, is this supposed to prove? . . . [M]erely because citizenship is not a sufficient factor to extend constitutional rights abroad does not mean it is not a necessary one.” 553 U.S. 723, 840 (2008) (Scalia dissenting).
Eisentrager.” So Scalia would appear to have it both ways: that Eisentrager is not a fair parallel to these Guantánamo cases, involving detainees who are more like prisoners of war than criminal convicts or suspects – but, at the same time, these detainees do not have Geneva Convention protections because Eisentrager controls this case. Indeed, he believes that although Eisentrager is not a fair parallel, the case does “form a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution.” But the Constitution does empower the United States to sign treaties with other nations, including the Geneva Convention, which restricts the U.S. government in its treatment of prisoners of war – which he indicates the “enemy combatants” are – regardless of whether this restriction is a function of the “substantive rights” of foreign citizens originally recognized by the Constitution.

Scalia mentions that a “bizarre implication from the Court’s reasoning” is that these detainees could “file habeas petitions and secure release before their trials take place.” This does not seem very strange in the common-law context of the writ, which is important given that this case turns on the common-law reach of habeas corpus as it is protected by the Suspension Clause. Pre-trial detention was the rule, not the exception, in classic habeas corpus.

“What drives today’s decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy,” Scalia writes. He may have a point, but the problem in the entire celebrated common-law history of the writ is one where the “inflated notion of judicial supremacy” acted to curb executive power even when that power had been thought to be above such judicial checks. The common law, unlike the enumerated powers approach of the U.S. Constitution, is indeed one of at least some flexibility and breaking with precedent when it appears to better satisfy the principles of liberty and law. It is true that the federal judiciary was not empowered this way by the Constitution, but this was the nature of judicial practice when the Constitution came to be. Scalia is right that “the question in these cases” is “whether the Constitution confers habeas jurisdiction on federal courts to decide petitioners’ claims,” but another way of looking at it could be whether the Constitution authorizes Congress to interfere with habeas corpus as a common law writ, putting aside what it has authorized or not authorized the federal judiciary to do. This tension is discussed in the concluding chapters.

Scalia worries that “the Court’s ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world.” This is indeed something of an implication of the principles expressed by the majority, even though it would never claim to have gone that far. As to the prudence or propriety of such a principle, it is not so easily dismissed completely out of hand.

The Suspension Clause protects “the common-law writ that was available at the time of the founding” and this did not include English territories outside of English sovereignty, Scalia writes. But the common-law writ of England at the time of the founding is not exactly the right context to decide upon what the Constitution is meant to protect, since the Americans did revolt against England for its inconsistency in applying its own legal principles – including, specifically, the lack of habeas corpus in Quebec. Indeed, the writ was probably more universally applicable in the English empire up until shortly before the American Revolution, when the hypocrisy of the empire became more apparent, and American sailors were detained without either the protections of criminal suspects or prisoner of war. That King George maintained the same kind of legal black hole that George W. Bush did is not the strongest argument that the latter’s policy would be deemed constitutional by the founding generation of Americans.

Habeas was “confined to the King’s dominions – those areas over which the Crown was sovereign,” notes Scalia. But that was the piece of hypocrisy at the heart of the Revolutionaries’ grievances. The King was exercising power in areas of the globe where the King’s courts had no power to check him. He had the effective sovereignty to execute policy without the limitations of sovereignty that come with judicial oversight. And this is exactly what the Bush administration was doing at Guantánamo. He points out that the Habeas Corpus Act of 1679 “did not extend the writ” to at least some “places to which British prisoners could be sent [as] recognized by the Act.” This was one of the main problems with the Act!

Scalia says “[t]he Court dismisses the example of Scotland on the grounds that Scotland had its own judicial system and that the writ could not, as a practical matter, have been enforced there. . . . Those explanations are totally unpersuasive. The existence of a separate court system was never a basis for denying the power of a court to issue the writ.” But, to turn it around back on him, perhaps just because the existence of multiple court systems all on its own is not a sufficient reason to deny the writ’s reach, perhaps the lack of another present judicial system is a good enough reason that the writ should run.

Yet, in the end, Scalia has a good point: “petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction.” Well, now there is a case: Boumediene v. Bush. And maybe this case does indeed involve “judicial activism,” and maybe such activism is to be generally avoided in the federal court system, and perhaps there is a reason for this tension, and once that reason would be removed, Scalia would have no such arguments against the system, at least not on these grounds.

Scalia argues that habeas being mainly limited to domestic reach is bolstered by the language in the Suspension Clause, making exceptions for “Rebellion or

Appendix H: Analysis of Boumediene v. Bush

Invasion,” both of which would involve “the territory of the United States.” But there is a way to turn this around as well. Perhaps the Framers did not want any restrictions on the power of common-law courts to check executive detentions unless the country was being actively invaded or in the midst of a domestic uprising. And what this would mean is insofar as habeas corpus’s extension is protected by the Suspension Clause, it would mean that Congress could not suspend habeas corpus in the war on terror even if it did so formally.

The idea that the U.S. government should have free hand in matters abroad is implied in Scalia’s contention that “[S]urely there is an even greater justification for suspension in foreign lands where the United States might hold prisoners of war during an ongoing conflict.” But, again, this essentially ignores the American frustration with British hypocrisy at the time of the founding. They were not complaining that the British government was abusing its subjects in England. They were complaining that it was abusing the rights of people on the periphery of its imperial reach. It could be argued that the Framers did not want to set up a government that acted with the imperial hypocrisy of Britain.

Scalia again reiterates that the Court had never before made such a bold decision, extending constitutional protections of habeas corpus to foreigners abroad. While he had just concurred with Roberts and himself suggested that one of the main problems with Boumediene was that it was replacing one system of legal oversight with another that is approximately the same, he concludes by stressing the potentially revolutionary nature of the Boumediene holding: “[M]ost tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner. The Nation will live to regret what the Court has done today.”

57 553 U.S. 723, 850 (2008) (Scalia dissenting).
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<tr>
<td><strong>Habeas corpus ad subjiciendum et recipiendum</strong></td>
<td>Latin for “you shall have the body to undergo and receive.” This is the writ that has survived to this day.</td>
<td>Common use starting in 14th century England</td>
<td>Today known more simply as “habeas corpus”</td>
</tr>
<tr>
<td><strong>Application/petition</strong></td>
<td>The paperwork submitted by the prisoner or someone on his behalf to ask a judge for a writ of habeas corpus.</td>
<td>Relevant for the whole history of habeas corpus, often with legal questions hinging on adherence to the application process.</td>
<td>Known in old England as the “application.” In modern United States usage, it is generally known as a “petition.”</td>
</tr>
<tr>
<td><strong>The return</strong></td>
<td>The response to the judge from the custodian (jailer), which explains the cause of detention, or at least invokes the authority to detain.</td>
<td>Relevant for most of the history of habeas corpus, often with legal questions hinging on the legitimacy of the return and the scope of the judge’s review power concerning the return.</td>
<td></td>
</tr>
<tr>
<td><strong>Respondent</strong></td>
<td>The one responding to the habeas corpus writ and who</td>
<td></td>
<td><em>(continued)</em></td>
</tr>
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<td>Term</td>
<td>Meaning</td>
<td>Historical Context</td>
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<tr>
<td>Respondent</td>
<td>submits the return – usually the custodian holding the prisoner.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Habeas corpus</strong></td>
<td>Latin for “you shall have the body with the reasons” for his detention.</td>
<td>Created by Chancery, <em>cum causa</em> was widely used in the 14th century. Its pairing with privilege and certiorari eventually gave way, for its redundancy, to the modern writ.</td>
<td>Also known as <em>Habeas corpus ad faciendum et recipiendum</em></td>
</tr>
<tr>
<td><strong>cum causa</strong></td>
<td><strong>Habeas corpus ad respondendum</strong></td>
<td>First uses in 13th century England</td>
<td>Some argue this is the most direct predecessor of modern habeas corpus</td>
</tr>
<tr>
<td><strong>Capias (ad respondendum)</strong></td>
<td>A flexible command to a sheriff to move a subject from one place to another. Latin for “you shall take the subject before the Court.”</td>
<td>Common through the 13th century. Jenks believes this is the predecessor to habeas corpus.</td>
<td></td>
</tr>
<tr>
<td><strong>Capias ultigatum</strong></td>
<td>The last warning in capias procedure</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Habeas corpus ad deliberandum et recipiendum</strong></td>
<td>Latin for “you shall have the body for the purpose of deliberation and receipt.”</td>
<td>Used to bring prisoners to the location of the alleged crime</td>
<td>Anachronistic writ</td>
</tr>
<tr>
<td><strong>Habeas corpus ad prosequendum</strong></td>
<td>Latin for “you shall have the body for the purpose of prosecution.”</td>
<td></td>
<td>Anachronistic writ</td>
</tr>
<tr>
<td><strong>Habeas corpus ad satisfaciendum</strong></td>
<td>Latin for “you shall have the body for the purpose of satisfaction,” such as execution.</td>
<td></td>
<td>Anachronistic writ</td>
</tr>
<tr>
<td><strong>Habeas corpus ad testificandum</strong></td>
<td>Latin for “you shall have the body for the purpose of testifying.”</td>
<td></td>
<td>Anachronistic writ</td>
</tr>
<tr>
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<td>Historical Context</td>
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<tr>
<td>Certiorari</td>
<td>Latin for “to be more fully informed.” A writ of certiorari is a command by a higher court to review a lower court’s decision or procedure.</td>
<td>King’s Bench used certiorari to remove proceedings from lower courts to itself, which was often coupled with early applications of habeas. By statute, the connection to habeas was affirmed in 1444.</td>
<td>To this day, the writ of certiorari and writ of habeas corpus often share a functional relationship</td>
</tr>
<tr>
<td>Writ of privilege</td>
<td>Issued to bring an official back to his own court</td>
<td>Privilege, coupled with <em>cum causa</em>, became used in the 15th century for judicial officers to be guaranteed a hearing before their own court</td>
<td></td>
</tr>
<tr>
<td>Writ de Odio et atia</td>
<td>Ancient writ allowing alleged murderers and felons out on bail</td>
<td>Guaranteed in the Magna Carta, unlike habeas corpus</td>
<td>Fell out of use as it was a drawn out process, usually limited to homicide cases, and required twelve sureties</td>
</tr>
<tr>
<td>Mesne process</td>
<td>An intermediate process, brought forth between the beginning and end of a suit or legal procedure</td>
<td>Originally, habeas corpus was a mesne process</td>
<td>No longer characterizes the workings of habeas corpus</td>
</tr>
<tr>
<td>Collateral attack</td>
<td>An indirect questioning of a legal judgment, in contrast to a direct appeal</td>
<td>Habeas corpus has always been an indirect, collateral review process</td>
<td></td>
</tr>
<tr>
<td>Vacation</td>
<td>A period when the court is “vacated” and the judge is not sitting on his court</td>
<td>Was a major subject of controversy in the 17th century, concerning when a judge could issue the writ</td>
<td></td>
</tr>
<tr>
<td>Court of King’s (Queen’s)</td>
<td>“The Court of the King Before the King”</td>
<td>Came about around the late 12th century.</td>
<td>The major issuer of habeas corpus writs</td>
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<tbody>
<tr>
<td>Bench</td>
<td>Himself,&quot; an important common law English court</td>
<td>Merged with Common Pleas, Exchequer, Court of Chancery into modern High Court of Justice in the 1870s.</td>
<td>from 16th through 18th centuries, came to dominate other courts.</td>
</tr>
<tr>
<td>Chancery</td>
<td>Main English equity court</td>
<td>Originated in King’s Council in 11th century. Merged with Common Pleas, Exchequer, and King’s Bench into modern High Court of Justice in 1870s.</td>
<td>Gained control over other jurisdictions in the 15th and 16th centuries, was later displaced as the chief habeas court by King’s Bench.</td>
</tr>
<tr>
<td>Exchequer</td>
<td>Equity/common law court of England</td>
<td>Split off from King’s council in 11th century. Merged with Common Pleas, Chancery, and King’s Bench into modern High Court of Justice in 1870s.</td>
<td>Issued habeas corpus writs at least by the early 15th century.</td>
</tr>
<tr>
<td>Common Pleas</td>
<td>Common law English court</td>
<td>Created in late 12th century/early 13th century. Merged with Exchequer, Chancery, and King’s Bench into modern High Court of Justice in the 1870s.</td>
<td></td>
</tr>
<tr>
<td>Privy Council</td>
<td>The monarch’s council of top advisers</td>
<td>Originated with the Norman monarchs, eventually most functions were taken by Parliament and other courts</td>
<td>The Council’s detentions were among the hardest to reach through habeas corpus, a major controversy in the 17th century.</td>
</tr>
<tr>
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<td>Meaning</td>
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<td>Further Notes</td>
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<tr>
<td>Court of High</td>
<td>The Supreme Ecclesiastical court of England.</td>
<td>Created during the Reformation, dissolved in 1641 by Parliament.</td>
<td>Its detentions for failure to give the <em>ex officio</em> oath were at the center of</td>
</tr>
<tr>
<td>Commission</td>
<td></td>
<td></td>
<td>17th century debates over habeas corpus.</td>
</tr>
<tr>
<td><em>Res judicata</em></td>
<td>Latin for “a matter [already] judged.” A precedent in law that is hard to judicially overturn.</td>
<td>There is ambiguity in its relationship with habeas in America, due to the extraordinary nature of the writ.</td>
<td>Today, usually called “claim preclusion” or “issue preclusion”</td>
</tr>
<tr>
<td>Gaol</td>
<td>Older spelling of “jail”</td>
<td>Common law nations, mentioned in the Magna Carta</td>
<td>Restricted usage by the 1267 Statute of Marlborough</td>
</tr>
<tr>
<td>Distrain</td>
<td>The seizure of property, usually for payment of debt</td>
<td></td>
<td>Today, it has little resemblance to habeas and is often known as “claim and delivery.”</td>
</tr>
<tr>
<td><em>Replevin</em> (or <em>repligando</em>)</td>
<td>A legal remedy whereby an owner reclaims his property</td>
<td>Was once used as a remedy somewhat like habeas, as serfs and others were regarded as property</td>
<td></td>
</tr>
<tr>
<td><em>Mainprize</em></td>
<td>A writ directed to sheriffs in cases without bail to command the acceptance of sureties</td>
<td>Relevant in common law in England, with an intertwining history with that of early habeas</td>
<td></td>
</tr>
<tr>
<td>Sureties</td>
<td>Money given by a third party to guarantee the fulfillment of an obligation, often that of a prisoner to appear</td>
<td></td>
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<tr>
<td><em>Alias</em></td>
<td>The second warning</td>
<td>Typical in legal procedure in medieval England</td>
<td></td>
</tr>
<tr>
<td><em>Plures</em></td>
<td>The third warning</td>
<td>Typical in legal procedure in medieval England</td>
<td></td>
</tr>
<tr>
<td><em>Exhaustion principle</em></td>
<td>The rule that other remedies have to be</td>
<td>A major point of contention in</td>
<td></td>
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<tr>
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<td>Historical Context</td>
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<td>federal habeas is</td>
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<td>available</td>
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*a* Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: The Belknap Press of Harvard University Press, 2010), 41. Halliday writes: “[T]his was the point of habeas corpus *ad subjiciendum*: it would be less concerned with moving bodies – many writs did that – than with inspecting the thinking and actions of those who confined bodies” (Halliday, 16–7).


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