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You Should Have the Body: Understanding Habeas Corpus

James Landman

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

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

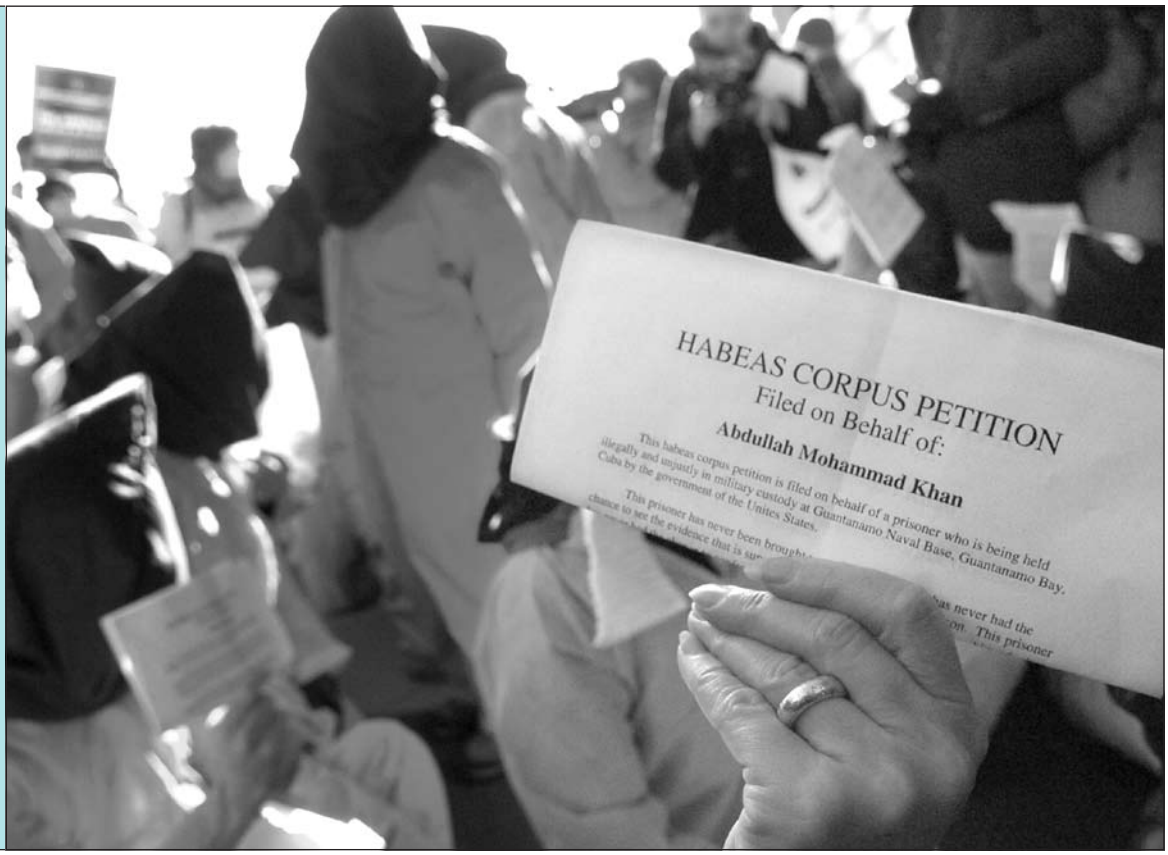
Origins of the Writ in English Law

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

In the medieval courts, writs of habeas corpus had several purposes, and took many forms. A writ was simply a written order of a court ordering someone to do something. Many of these writs involved a *corpus* (the Latin term for "body"), directing the person who had control of the body in question to appear in court for the purpose stated in the writ (the term *habeas corpus* means "you should have the body"). Thus, a medieval sheriff might receive a writ of *habeas corpora juratorum* (ordering him to appear in court with the bodies of potential jurors) or a writ of *habeas corpus cum causa* (ordering him to appear in court with the body of a prisoner "with cause" for the prisoner's confinement). The modern habeas writ developed from the writ of *habeas corpus ad subjiciendum*, which directed the person detaining a prisoner to produce the body of the prisoner with the reason for the detention, ready to submit (*ad subjiciendum* means "for submitting") to whatever the court ordered with respect to the prisoner. If the court found that the prisoner was being held without cause, it could order his or her release.[1]

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

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



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

Reuters/Jonathan Ernst (United States)

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

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

The Writ of Habeas Corpus in American Law

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

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

The Suspension Clause and the Civil War

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

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

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

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

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

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

In *Ex parte Merryman*, Chief Justice Taney, sitting as a circuit court judge, argued that President Lincoln had violated the language of the Suspension Clause. Taney had issued the writ of habeas corpus as petitioned by Merryman's lawyers, but was met by the refusal of the federal officers to appear and explain the reasons for Merryman's detention. "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion," Taney asserted, "and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress." The president's duty was "to faithfully execute" the laws of the land, including, where necessary, coming to the aid of the judicial authority in execution of laws "expounded and adjudged of" by the judiciary. Contrary to the argument that Attorney General Bates would make on coordinate branches, Taney declared that in exercising his power in aid of the judiciary, the president "acts in subordination to judicial authority, assisting it to execute its process & enforce its judgments."[3]

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

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

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

suspension through legislation passed by Congress.

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

Reconstruction and Beyond: Extension of Habeas Corpus to the States

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

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

The extension of the federal courts' powers to issue writs of habeas corpus "where any person may be restrained of his or her liberty in violation of the Constitution" gave the federal courts the power to issue writs upon the petition of state prisoners who claimed a violation of their constitutional rights in state judicial processes. Although the legislative history surrounding passage of the act is uncertain, it seems that Congress was motivated in part by a distrust of state officers—judicial and otherwise—in recognizing and enforcing federal rights, including those contained in the Fourteenth Amendment and the civil rights statutes drafted immediately in the wake of the Civil War.[4]

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

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

The expansion of federal habeas corpus review of state proceedings reached a high point in a pair of Supreme Court decisions from the 1950s and 1960s. In *Brown v. Allen*, 344 U.S. 433 (1953), the Supreme Court held that a federal court in a habeas corpus proceeding was not bound by a state judiciary's resolution of a federal constitutional issue, even if the issue had received a full and fair hearing in the state courts. In 1963, the Supreme Court's decision in *Fay v. Noia*, 372 U.S. 391, held that failure to exhaust one's remedies (e.g., appeals) in the state courts would not necessarily foreclose habeas relief in the federal courts, particularly where the failure to exhaust state remedies was not intentional. In this case, the petitioner, Noia, had been convicted of felony murder (involvement in a robbery where an individual was killed) with two other codefendants on the basis of coerced confessions. The state admitted to the coerced confession, but had denied relief because Noia had failed to make a timely appeal of his conviction.

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

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

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

Habeas Corpus Today

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

- A one-year deadline within which state prisoners have to file a federal habeas petition.
- A prohibition on federal habeas relief for claims that have already been adjudicated by the state court. The prohibition can be waived only if the state court decision contradicted, or unreasonably applied, clearly established federal law, as determined by the Supreme Court, or unreasonably determined the facts based on the evidence presented in the state trial.
- Limitations on repetitious petitions for habeas relief. For a second or successive habeas petition to succeed, a three-member panel of a federal court of appeals serves as a "gatekeeper" and must determine that either newly discovered evidence or a newly recognized interpretation of the Constitution clearly establishes that no reasonable factfinder would have found the prisoner guilty. "Gatekeeper" decisions of the court of appeals cannot be appealed to the Supreme Court.

Opponents of capital punishment have been particularly critical of AEDPA,

RESOURCES

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

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

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

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

TEACHING ACTIVITY

Habeas Corpus: The Ultimate Right?

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

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

Step One

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

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

Step Two

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

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

Step Three

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

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

Step Four

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

1. Why might the public safety require that the writ be suspended in a time of rebellion or invasion?

2. Based on the language of the Suspension Clause and its placement in Article I, do you think the Constitution gives the power to suspend the writ of habeas corpus to Congress? Imagine that an attack is made on Washington, D.C., and the Congress is unable to convene. Should the president also have the power to suspend the writ? Should the president be required to seek Congress's approval of suspension once Congress is again able to convene?

3. Article III of the Constitution gives the federal courts power over all cases arising under the Constitution. If Congress or the president suspended the writ of habeas corpus, should the federal courts have the power to decide whether the constitutional conditions for suspension ("when in cases of rebellion or invasion the public safety may require it") have been met?

4. (Optional) Review the cases of *Boumediene v. Bush* and *Al Odah v. United States*, pending before the Supreme Court, using the resources at **www.abanet.org/publiced/preview/guantanamo.shtml.** Discuss the roles of the three branches and the Suspension Clause in these cases.

Step Five

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

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

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

The Supreme Court's most recent detainee decision in *Hamdan v. Rumsfeld*, Docket No. 05-184 (2006), held that Congress had not given the executive branch authority to try detainees at Guantanamo Bay in special military tribunals. In response to the *Hamdan* decision, Congress passed the Military Commissions Act of 2006. In addition to authorizing the use of military commissions to try detainees, the act provides that no federal court shall have jurisdiction to consider an application for a writ of habeas corpus filed by an alien who is being detained as an enemy combatant or is awaiting determination of enemy combatant status.

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

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

Notes

1. A list of different English common law *habeas corpus* writs is provided in Charles Doyle's "Federal Habeas Corpus: A Brief Legal Overview" (Congressional Research Service, Library of Congress, April 26, 2006), pages 2-3.
2. This account of the Merryman case is adapted from Bruce Ragsdale, *Ex parte Merryman and Debates on Civil Liberties During the Civil War* (Washington, D.C.: Federal Judicial Center, 2007).
3. Ibid., 34.
4. For a discussion of the legislative history of the 1867 Habeas Corpus Act, see Stephen A. Saltzburg, "Habeas Corpus: The Supreme Court and the Congress," *Ohio State Law Journal* 44 (1983): 367-391.
5. *Fay v. Noia*, 372 U.S. 391 (1963), 401-402.
6. See *Felker v. Turpin*, 518 U.S. 1051 (1996).

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