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Habeas Corpus and "Enemy Combatants"

Carolyn Pereira and Nisan Chavkin

Habeas corpus—"you have the body" in Latin—is an ancient privilege of English law that predates the Magna Carta and was an early power of English courts. The writ, or written order of the court, gave judges the power to command the presence of a person before the court. This power worked two ways: (1) the writ was an order for the government and the accused to appear before the court; and (2) it required the government to explain why a person was being detained. If the court was not satisfied by the government's explanations for holding a person, the judges had the power to free the prisoner. People in England believed that habeas corpus was an important protection against the government holding people as prisoners simply for political or personal reasons. (See the Elementary Lesson for an example of why the right became so important to the English.)

Although the writ of habeas corpus was not officially extended to the American colonies, the colonists themselves took it as their birthright, and following independence they included it in several state constitutions and the Northwest Ordinance of 1787.[1] It also became one of the few rights incorporated directly into the Constitution itself: "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."[2]

In addition to the Constitution, the right of habeas corpus is established in federal statute by Congress. The United States Code, the federal law, states that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[3]

Habeas Corpus during Wartime

The writ has been suspended at different times in American history. In early 1861, for example, at the start of the Civil War, President Abraham Lincoln suspended it himself, without permission from Congress. Congress later passed legislation to support his actions. However, in the case *Ex Parte Milligan* (1866), the U.S. Supreme Court overturned the conviction of Lambdin Milligan by a military tribunal convened in Indiana because the civilian courts were still open there and Indiana was not a war zone. Writing for the Court, Justice Chase noted that "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."[4] Milligan went free. (See the Middle School Lesson on Milligan for details of the case.)

During World War II, the Supreme Court ruled unanimously in *Ex Parte Quirin* (1942) that a military tribunal was appropriate for unlawful combatants.[5] Eight Germans, some of whom were U.S. citizens, received training in sabotage in Germany and arrived in the U.S. by submarine in June of 1942. Some of them turned themselves in to the FBI, although the FBI at first did not believe them. Eventually all were taken into custody, tried by a military tribunal, and sentenced to death. The majority of the Court argued that while Milligan was a civilian, the Germans were in the military. Six of the spies were executed. Two were returned to Germany after the war.

In 1946, the Court again held in *Duncan v. Kahanamoku* that a 1941 suspension of the writ by President Franklin Delano Roosevelt in Hawaii, which was not supported by an Act of Congress, was unconstitutional.[6] Significantly, both *Milligan* and *Duncan* were decided after hostilities had ended.

To insure that a situation such as the internment of persons of Japanese descent during World

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Habeas Corpus: A writ of habeas corpus (Latin for "you have the body") is an order by a judge or court to a prison official ordering that an inmate be brought before the court so the judge can decide whether or not that person is imprisoned lawfully. If the court determines that a person is not held lawfully, then the person can be released from custody.

ELEMENTARY LESSON PLAN

A Readers' Theater: The Origin of the Writ of Habeas Corpus

Teacher: Imagine a town where the mayor has thrown everyone out of the city council and locked the doors. The city council can't make any more laws. The mayor asks his friend Dan for money to help pay the town's bills, particularly a raise for the police, and to help buy the mayor's new house. Dan says no. Dan has money, but he doesn't think he should say yes just because the mayor is a friend. Or at least the mayor used to be a friend. Then Dan hears a knock at his door. It's the police. They take Dan to jail. Dan wants to know why, but they won't tell him. Could this ever happen? Is it fair? It did happen in 1627 in England.

Reading

The Players:

Narrator
King Charles I
Thomas Darnel, a Knight
Sheriff
Jailer

Narrator: This story is about an English king who closed Parliament, the law-making arm of the government, because it wouldn't pass a law to raise taxes on the rich. The king thought, "My kingdom needs more money to pay my soldiers and to keep me living like a king. The poor people don't have enough money. Why not make my rich knights pay more?" But Parliament had mostly rich people in it, and they didn't want to pass such a law, particularly to pay for the king's lifestyle.

When Parliament refused to ask the rich knights for money, the king was very angry. But the king was also very powerful, so he asked the knights himself. One of his knights, Thomas Darnel, refused to give his money to the king.

Let's listen to what happens to Thomas.

King Charles I: Sheriff, I want you to arrest Thomas Darnel immediately and have him locked in the tower.

Sheriff: On what charge? What did he do?

King Charles I: Just do what I say or I will throw you in prison, too.

Narrator: The sheriff goes to Thomas's house and knocks on the door.

Sheriff: Open this door in the name of the King! You are under arrest.

Thomas Darnell: What law am I supposed to have broken?

Sheriff: Just come with me.

Narrator: The sheriff takes Thomas to the tower and has the jailer lock him up.

Thomas Darnell: Jailer, tell me: What have I done? Why am I here? I need to be able to defend myself. Please tell my family where I am.

Jailer: I don't know why you are here. For all I know, you are a dangerous killer. I can't help you.

Narrator: Finally someone finds out where Thomas is and gets an attorney to help Thomas. The attorney goes before a judge to ask why Thomas is in jail.

Activity

In pairs, answer the following questions:

1. Why did the king lock him up? Did Thomas Darnell break a law?
2. If you were the judge, what would you do and why?
   a. Leave Thomas in jail
   b. Let Thomas go home
   c. Find out why Thomas was in jail and call witnesses to help you decide whether Thomas was guilty of breaking a law

Teacher: What really happened to Thomas? The judge agreed to find out why Thomas was being held. But the king refused to say why. The attorney for the king argued that the king should not have to tell the court why Thomas was being held because it was top secret. And the judge agreed! Thomas went back to jail. The judge said that it was important for the king to be able to keep secrets. Who knows, maybe Thomas Darnell was a danger to the kingdom? After all, lots of knights were probably very angry with the king and may have planned to overthrow him.

The people who wrote the U.S. Constitution wanted to make sure that anyone held in jail is there for a lawful reason and knows why he (or she) is there. They called this the right to a *Writ of Habeas Corpus*. Habeas corpus means you have the right to be brought before a judge, told what you are accused of doing, and have the judge decide whether you should be held for trial or set free. Remember what happened to Dan? Today Dan would have to come before a judge. The judge would tell Dan what he was accused of doing and decide if the police had a lawful reason. In Dan's case, he had not broken a law. He would go free.

A Case Study: The Writ of Habeas Corpus during the Civil War

Lambdin P. Milligan lived in Indiana and passed the bar exam without ever attending law school, like Lincoln. Even though Milligan had a peaceful manner, he had some very strong feelings about right and wrong. He believed that the federal government did not have the right to tell a state what to do and that it was tyranny for the North to force the South to free their slaves. The Civil War had brothers fighting each other. Milligan wanted to stop the fighting. Furthermore, Milligan also believed that Lincoln was trying to destroy the Constitution by denying people their rights. He worried that the United States would become a dictatorship.

In 1864, Milligan joined the "Sons of Liberty," a secret group that wanted to help the Democrats win control of Congress and make peace with the South. Some of the "Sons of Liberty," however, were much more radical. They sent guns, blew up railroads, and gave the Confederates information on where Union troops were. They planned an even bigger event to take place at the 1864 Democratic National Convention in Chicago. The radicals would start a riot. When the troops came to stop it, other radicals would raid the unguarded arsenals, steal Union weapons and invade Union prisoner-of-war camps to free Confederate soldiers. These troops would take over Kentucky, Missouri, Ohio, Indiana, and Illinois.

The plot was discovered early in the fall of 1864 and several people were arrested, including Milligan. A military court tried Milligan. He was charged with inciting a rebellion, aiding the enemy, and planning the attack on Union troops in Indiana. He was found guilty and sentenced to hang.

Milligan did not believe this was a fair trial. Even though Indiana was under martial law, the civilian courts were open. Milligan was a civilian. He believed that the army had no right to arrest him or decide whether he was guilty. Besides, the Constitution said that the government could only declare martial law in a war zone. Since Indiana wasn't a war zone, martial law was illegal. Instead, Milligan claimed he should have been tried in a civil court. In order to be found guilty in a civil court, all jurors (his peers, not military officers) must agree that the charges had been proven beyond a reasonable doubt. He claimed in a civil court there would have been reasonable doubt.

Lincoln, as the Army's commander in chief, had to decide whether to sign the order or set Milligan free. He didn't want to hang Milligan, but he did want to keep Milligan in jail until the end of the war. So he asked the Army to correct some mistakes in the paperwork knowing that it would take months. By then the war would be over.

Although the revised death sentence was returned to the White House when the war was over, Lincoln had been killed. Andrew Johnson, the new president, told the Army to hang Milligan. Newspapers, government offices, and the president received hundreds of angry letters saying that Milligan was a hero for standing up for what he believed in or simply demanding a fair trial for Milligan. People thought that killing a man without a fair trial was wrong.

Andrew Johnson delayed the hanging. Milligan asked the Supreme Court to issue a writ of habeas corpus—let him go or let him be tried in a civilian court.

Activity

Ask the class to brainstorm a list of reasons for and against issuing a writ of habeas corpus.

Option #1: Have the class take a stand on an imaginary line with those who agree with issuing the writ on one end; those who don't know in the middle, and those who want to deny the writ at the other end. Students should be prepared to support their stand with at least one reason.

Option #2: Have students write a letter to the court explaining why they believe the court should or should not issue a writ of habeas corpus.

Compare their reasons to what happened and this to what has happened after September 11.

Adapted from Coral Suter and Marshall Croddy, To Promote the General Welfare: The Purpose of Law *(Los Angeles, CA: Constitutional Rights Foundation, 1985), 24-29.*

Outcome of Case: A year after the Civil War ended, the Supreme Court decided in *Ex Parte Milligan* (1866) that Milligan should not have been tried by a military tribunal because the civilian courts in Indiana were open and Indiana was not a war zone. Milligan was released.

In this June 26, 2006, file photo, reviewed by U.S. military officials, a detainee, name, nationality, and facial identification not permitted, holds onto a fence as a U.S. military guard walks past, within the grounds of the maximum-security prison at Camp 5, at the Guantanamo Bay U.S. Naval Base, Cuba.

(AP Photo/Brennan Linsley, Pool)

HIGH SCHOOL LESSON PLAN

Moot Court: *Hamdi v Rumsfeld*

Yaser Esam Hamdi was captured when his military unit surrendered in Afghanistan in late 2001. He had an AK-47. The U.S. government believed he had trained with the Taliban and had ties to al Qaeda. He was sent to Guantanamo Bay as an "enemy combatant." Hamdi had been born in Louisiana, making him a U.S. citizen, even though he had grown up in the Middle East.

In June of 2002, his father filed a habeas petition in the Federal District Court in the Eastern District of Virginia. The court ordered immediate, confidential access to an attorney because they believed the government evidence did not show that Hamdi was an "enemy combatant." The United States appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit reversed the district court's ruling. This court reasoned that the executive branch of government needed more authority than the courts in deciding whether a detained person is an enemy combatant. The public safety was of primary importance. Hamdi appealed to the Supreme Court.

Can Hamdi be held indefinitely without access to confidential counsel or should a writ of habeas corpus be issued?

Arguments for Secretary of Defense Rumsfeld (the United States)

- The president has the power to detain "enemy combatants" captured in war zones. This power is not affected by [the detainee's] status as a U.S. citizen.
- Congress's Authorization for Use of Military Force in 2001 strengthens, rather than limits, the executive's power.
- Hamdi's detention is consistent with international treaty obligations and standard military practices.
- The court should respect the executive's determination that Hamdi is an enemy combatant.

Arguments for Hamdi

- United States citizens should not be subject to two years of detention unless they have access to meaningful review by habeas corpus proceedings in the courts, including access to counsel.
- Allowing the executive to exercise such discretionary power over those it labels "enemy combatants" undermines the purpose of a congressional law prohibiting the unilateral indefinite detention of citizens.
- The president's commander-in-chief powers do not permit him to indefinitely detain citizens once taken beyond "areas of actual fighting," which is also in violation of the laws of war (as defined by the Geneva Conventions).
- Congress is in exclusive possession of the power to authorize the detention of American citizens that is "more than temporary" and has not done so here.

Activity

After reading and understanding the facts and issue, divide the class into groups of three to four. The groups should select the most compelling arguments listed above; then discuss and vote on the question. The groups should report back to the class on their decisions. What did they have in common? On what did they disagree? How did their decisions compare with the Supreme Court's decision?

Adapted from materials developed by Street Law, Inc., for its Supreme Court Summer Institute. See www.streetlaw.org/content.asp?ContentId=185

War II not happen again and to repeal the Emergency Detention Act of 1950, Congress in 1971 passed a federal law making explicit the protections of habeas corpus. The United States Code now says, "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[7]

The Commander in Chief, Enemy Combatants, and the War on Terrorism

Following al Qaeda's attack on the United States on September 11, 2001, President Bush took initiatives to combat terrorism and prevent future attacks on American soil. Within a week, the Congress of the United States overwhelmingly passed the Authorization for Use of Military Force (AUMF), which authorized the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines 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 acts of international terrorism against the United States by such nations, organizations or person."[8]

In October, U.S. forces invaded Afghanistan, where al Qaeda maintained training camps and where, it was believed, Osama bin Laden and other key al Qaeda leaders worked in collaboration with the Taliban, the ruling government of Afghanistan who were hosts and allies of al Qaeda. By November 2001, the Taliban government had fallen, al Qaeda forces had fled Afghanistan, and the United States and its allies were responsible for the country. The U.S. also took control of thousands of persons captured during the war.

On November 13, 2001, the president issued a military order for "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" that led to the creation of special military tribunals for al Qaeda members and supporters. The president also determined that hundreds of persons were to be held as "enemy combatants."

The term "enemy combatant" was new. It encompassed two previously recognized classes of detainees during wartime: lawful and unlawful combatants:

> Each is subject to capture and detention for the duration of a conflict. "Lawful combatants," or prisoners of war, are entitled to the substantive and procedural protections set forth in the Third Geneva Convention of 1949, such as the right to the exercise of religion, the ability to correspond with persons outside detention and to keep personal effects, and the entitlement to living conditions equivalent to the soldiers of the detaining power. "Unlawful combatants" do not receive these protections, and may additionally be "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[9]

Thus, the president created a new category of detainees that was different from that of a prisoner of war, an unlawful combatant, or a criminal defendant. Therefore, the president argued, enemy combatants did not receive any of the protections given to prisoners of war or to persons accused of a crime. These persons could be held without charges, without outside contact, and without the benefit of legal counsel, for as long as the government determined necessary. Moreover, because this was a military decision made by the president acting as commander in chief, the president alone was responsible for making the determination. To secure their special status, the administration decided to hold enemy combatants somewhere that the normal protections of U.S. laws or international treaties did not apply. The administration selected the U.S. Navy base on the southeast coast of Cuba called Guantanamo Bay, which had come under U.S. control in 1903 as a result of an unlimited lease from Cuba negotiated after the Spanish-American War. The first prisoners from Afghanistan arrived at Guantanamo Bay on January 11, 2002, and as many as 680 persons were held there. By April 2008, approximately 275 foreign nationals were still being held at Guantanamo as enemy combatants.[10]

Enemy Combatants and Habeas Corpus: *Rasul*, *Hamdi* , and *Padilla*

Almost from the beginning of the global war on terror, the Bush administration argued that enemy combatants had no right to a writ of habeas corpus, and that these foreign nationals could be held at Guantanamo Bay until the end of the war—that is, indefinitely. Enemy combatants, in response, applied for habeas relief in federal court. Some notable cases have resulted.

Rasul v. Bush (2004). Shafiq Rasul and Asif Iqbal were two British citizens captured in Afghanistan and subsequently transferred to Guantanamo Bay. In 2002, they and two Australian citizens, Mamdouh Habib and David Hicks, as well as 12 Kuwaiti citizens, challenged the legality of their detention. Through their relatives, they filed various actions in federal court alleging that none of them had ever been a combatant against the United States or had ever engaged in any terrorist acts. Instead, they claimed that they had been turned over to the U.S. for various reasons, including prisoner bounties and captures by other governments or the Northern Alliance, a coalition of Afghan groups opposed to the Taliban. The detainees claimed that none of them had been charged with any wrongdoing, or permitted to consult with legal counsel, or provided access to the courts or any other tribunal. They claimed that denial of these rights violated the Constitution, international law, and treaties of the United States.

In 2002, the district court considered and dismissed all these actions because of lack of jurisdiction, citing a U.S. Supreme Court decision that held that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." In 2003, the U.S. Court of Appeals for the

District of Columbia Circuit affirmed the decision of the lower court, agreeing that the district court lacked jurisdiction. The detainees appealed this decision, and later that year the U.S. Supreme Court granted *certiorari*—that is, they agreed to hear the case—and scheduled arguments for April 2004. By that time, the government had released both Rasul and Iqbal and had permitted Hicks to meet with counsel.

On June 28, 2004, the Supreme Court reversed the lower courts by a 6–3 decision. Writing for the Court, Justice Stevens noted that "'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,' and that a district court acts 'within [its] respective jurisdiction'... as long as 'the custodian can be reached by service of process.'" Moreover, whatever claims might arise about the right of habeas corpus not extending beyond United States territory, such claims had "no application" to habeas claims with respect to persons detained within the territorial jurisdiction of the United States, since the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base and "may continue to exercise such control permanently if it so chooses."[11]

The Supreme Court decided two other habeas cases on the same day as *Rasul*. In *Hamdi v. Rumsfeld*, Court determined that Yaser Esam Hamdi had the right to habeas protections as a U.S. citizen captured on the battlefields of Afghanistan. A citizen of Saudi Arabia, Hamdi was born in the United States while his parents, who are Saudi Arabian nationals, were living in Louisiana. By the birth citizenship clause of Fourteenth Amendment to the U.S. Constitution, Hamdi was a U.S. citizen. When the government learned of Hamdi's U.S. citizenship in April 2002, it kept his designation as an enemy combatant but removed him from Guantanamo Bay and placed him in a naval brig [prison] in Norfolk, Virginia; he was later transferred to a brig in Charleston, South Carolina. During two years of federal detention, Hamdi could not communicate with his attorney or his father, who filed a habeas petition on his behalf.

Writing for the Court, Justice O'Connor noted, "The Government has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]" but still accepted the government's position that the Authorization for the Use of Military Force gave the president the power to detain enemy combatants. Nevertheless, the Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."[12] Shortly after the decision was announced, the government released Hamdi on the condition that he renounce his American citizenship and return to live in Saudi Arabia. He was never charged or convicted. (See the High School Activity for the arguments in the case.)

With *Rasul* and *Hamdi*, the Court also decided *Rumsfeld v. Padilla*.[13] In May 2002, U.S. citizen Jose Padilla arrived at O'Hare International Airport in Chicago on a flight from Pakistan via Switzerland. A former Chicago gang member, Padilla had converted to Islam in the late 1990s and then traveled to various Muslim countries, including Pakistan and Afghanistan, where he met with and allegedly was trained by al Qaeda. First seized and held by U.S. Marshals as a "material witness" for a grand jury investigation, Padilla was determined to be an enemy combatant by the president; U.S. Attorney General Ashcroft alleged that Padilla was plotting to detonate a "dirty" nuclear bomb in an American city. The president ordered him transferred to a military brig in Charleston, South Carolina, on June 9, 2002. Unlike Hamdi, Padilla was not seized overseas but in Chicago, where there was no declaration of martial law or suspension of habeas corpus. Padilla also appeared to have much stronger connections to al Qaeda than did Hamdi. Like Hamdi, however, Padilla was held without charges, in isolation, and without legal counsel. In a 5-4 decision, the Court held that Padilla's habeas petition went before the wrong

court (in New York, where the grand jury was working) and that any appeal needed to come before the court where he was located (in South Carolina, where he was held).

In November 2005, after 42 months in detention, the government changed Padilla's status without explanation. His designation as an enemy combatant was dropped, and the government brought felony terrorism charges against him in federal criminal court. In August 2007, a jury in Miami unanimously convicted Padilla of "conspiracy to support Islamic terrorism overseas" and he was sentenced to 17 years and four months in prison.

Creating an Alternative to Habeas: *Hamdan* and *Boumediene*

The Bush administration continued to believe that the detainees at Guantanamo Bay should not have habeas corpus relief through the federal courts but instead should be dealt with through special military procedures. In response to *Hamdi*, in July 2004 the administration created by military order the Combatant Status Review Tribunal (CSRT), a military structure "to provide detainees at Guantanamo Bay Naval Base with notice of the basis for their detention and review of their detention as enemy combatants."[14] Detainees challenged this alternate arrangement twice in federal court.

Hamdan v. Rumsfeld (2006). Salim Ahmed Hamdan was Osama Bin Laden's driver. He was captured and sent in June 2002 to Guantanamo Bay. Over a year later, the president deemed him eligible for trial by military commission for then-unspecified crimes. After another year, Hamdan was charged with one count of conspiracy "to commit . . . offenses triable by military commission." Hamdan filed a petition for habeas corpus in federal district court. Meanwhile, a CSRT decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an enemy combatant. Hamdan's habeas petition was accepted by the district court, but the decision was reversed by the court of appeals, which held that the military tribunals had been established by Congress and thus were not unconstitutional. On June 29, 2006, the Supreme Court ruled 5-3 in favor of Hamdan and concluded that the military commission lacked the power to proceed because its structure and procedures violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[15]

Boumediene v. Bush (2008). Undeterred, the administration introduced legislation in 2006 to remove enemy combatants from the jurisdiction of the federal courts. The Military Commissions Act of 2006 (MCA), passed by Congress and signed into law by President Bush, eliminated the possibility of persons designated as enemy combatants (according to procedures established in the Detainee Treatment Act of 2005) submitting habeas applications to the federal courts. Lakhdar Boumediene was a native of Algeria, who in 2002 was seized by Bosnian police along with five other Algerians in connection with a possible attack on the U.S. embassy there. The men were designated enemy combatants and transferred to Guantanamo Bay. Boumediene and others had their first habeas petition dismissed by a court of appeals in 2003 but then reinstated after the U.S. Supreme Court decided *Rasul* in 2004. Upon their second petition to the district court, Boumediene and others argued that the MCA did not apply to their petitions, and that if it did, it was unconstitutional. The court of appeals concluded that, according to the terms of MCA, no federal court had jurisdiction over the detainees' habeas corpus applications and that the detainees were not entitled to the privilege of the writ or the constitutional habeas corpus protection.

In a 6-3 decision, the Supreme Court on June 12, 2008, again found in favor of the detainees at Guantanamo Bay. Writing for the Court, Justice Kennedy said "Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus.... We hold these petitioners do have the habeas corpus privilege." Although Congress had enacted the Detainee Treatment Act of 2005, which provided certain procedures for review of the detainees' status, the Court held that "those procedures are not an adequate and effective substitute for habeas corpus." Therefore, the Military Commissions Act was "an unconstitutional suspension of the writ." Significantly, Justice Kennedy noted that the Court did not hold "whether the writ must issue." Instead, the Supreme Court returned the case to the district court for a determination.

Habeas Today

Since *Boumediene*, the remaining prisoners at Guantanamo Bay have begun to file habeas petitions in federal court, where most of their futures will be determined. President Bush has identified several high profile detainees for special military tribunals, the first in more than 50 years. Hamdan, Bin Laden's driver, was tried and found guilty on August 6, 2008, of five counts of "material support for terrorism" and acquitted of five other counts, including the provision of weapons. He was sentenced to 66 months, with credit for 61 months already served, but thereafter he will remain in government custody as an enemy combatant. Hamdan's verdict and the other tribunals are being challenged because the procedures have been created uniquely for these detainees.

In addition, there remains one enemy combatant held in the United States. Ali Saleh Kahla al-Marri, a citizen of Qatar, graduated from Bradley University in Peoria, Illinois, in 1991. After returning to Qatar, he came back to the United States with his wife (who is from Saudi Arabia) and their five children, on September 10, 2001, on a student visa to study for a graduate degree at Bradley. FBI agents first questioned al-Marri at his West Peoria home in October 2001. As with Jose Padilla, the government held him on a material witness warrant, and a search of his laptop computer revealed such items as audio files of lectures by Osama Bin Laden and his associates; links to websites on hazardous chemicals and how to buy them, weapons and satellite equipment; and extensive evidence

of credit card fraud. The government first charged al-Marri with credit card fraud and lying to federal agents. Weeks before his federal trial in June 2003, the government asked that all charges be dropped. President Bush then designated him an enemy combatant, and al-Marri was transferred to military custody in a brig in South Carolina, where he has remained since.

In July 2008, the Court of Appeals for the Fourth Circuit held *en banc* that "if the government's allegations about al-Marri are true, Congress [through the Authorization for Use of Military Force] has empowered the President to detain him as an enemy combatant" and that "assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, al-Marri has not been afforded sufficient process to challenge his designation as an enemy combatant."[16] Thus, al-Marri may continue his application for habeas corpus in federal court, even as he is detained without trial or charges.

The writ of habeas corpus remains a critical tool in maintaining the balance between the rights and liberties of individuals and the responsibilities of the federal government to protect the welfare of the nation. The final calibrations of that balance remain undetermined as we mark the seventh anniversary of the attacks of September 11.

Notes

1. Northwest Ordinance (1787), Article 2.
2. Constitution of the United States, Article I, Section 8.
3. 28 U.S.C. § 2241.
4. *Ex Parte Milligan*, 71 U.S. 2 (1866). The decision can be accessed at http://supreme.justia.com/us/71/2/case.html. Other decisions cited in this article can also be accessed through Justia US Supreme Court Center at Justia.com.
5. *Ex Parte Quirin*, 317 U.S. 1 (1942).
6. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).
7. 18 U.S.C. 4001(a).
8. "Authorization for Use of Military Force," September 18, 2001, accessed at news.findlaw.com/wp/docs/terrorism/sjres23.es.html.
9. American Bar Association, "Task Force on Treatment of Enemy Combatants," Revised Report No. 109 (February 10, 2003). The final quote in this excerpt is from *Ex Parte Quirin*, 317 U.S. 1, 31 (1942).
10. Jeffrey Toobin, "Camp Justice," *The New Yorker* (April 14, 2008).
11. *Rasul et al. v. Bush*, , 542 U. S. 466 (2004).
12. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
13. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
14. Paul Wolfowitz, Memorandum for the Secretary of the Navy, "Order Establishing Combatant Status Review Tribunal,"(July 7, 2004). Of note is the fact that this order also defined an enemy combatant: "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."
15. *Hamdan v. Rumsfeld*, No. 05-184 (2006). Chief Justice Roberts, who had written the lower court decision while serving on the Court of Appeals, did not participate in the Court's deliberations.
16. *Al-Marri v. Pucciarelli*, No. 06-7427 (CA4 2008).

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