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Habeas Corpse: The Great Writ Hit

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Habeas Corpse

THE GREAT WRIT HIT

"It must never be forgotten that the writ of habeas corpus is the precious safeguard of liberty and there is no higher duty than to maintain it unimpaired."

—Charles Evans Hughes

"[I]f ever temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on [the] denial [of the writ of habeas corpus] with apathy, the most distinguished characteristic of our constitution will be effaced."

—Henry Hallam

Twice within the last year, the current 109th Congress has enacted anti-habeas corpus statutes—statutes that curtail the efficacy of the writ of habeas corpus. These dreadful statutes are Orwellian nightmares. They are, in the words of Sen. Patrick Leahy, "un-American" and "undercut everything this nation stands for." They are practically unparalleled in our history in opening the door to legalized oppression. They are colossal mistakes which future generations will deride in the same way our generation scorns the Alien and Sedition Acts of 1798 or the congressional legislation that authorized the internment of the Japanese-Americans during WWII.

Before discussing the specifics of the two new anti-habeas corpus statutes, however, it would be helpful to give a brief overview of the nature, importance and history of the writ of habeas corpus.

What Habeas Is

The writ of habeas corpus protects us from being unlawfully restrained of our liberty. The granting of the writ is a key procedural step taken by the court in certain nonjury civil actions—called habeas corpus proceedings—instituted to challenge and obtain release from illegal confinement. After the writ has been issued, the court examines whether the restraint on liberty complained of is legal, and, if it is not, terminates the restraint. Since confinement is unlawful when it contravenes our fundamental rights, the writ of habeas corpus provides assurance that we will not be imprisoned by the government in violation of our constitutional or other basic rights.

The writ of habeas corpus has been aptly described as "one of the precious heritages of Anglo-American civilization." This is why judges, legal commentators and scholars have for hundreds of years justly lavished praise on the writ, describing it as "the Great Writ," "the Freedom Writ," "the Writ of Liberty," "the most celebrated writ in our law," and "the great and efficacious writ in all manner of illegal confinement." They also laud it as "the highest safeguard of liberty," "the most important safeguard of personal liberty," "the most efficient protector of liberty that any legal system has ever devised," "the great key of liberty to unlock the prison doors of tyranny," "the safeguard and palladium of our liberties," "the best and only sufficient defense of personal freedom," "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action," "the only real and sufficient bastion of personal freedom and dignity," and "the greatest bulwark of freedom against tyranny, oppression, and injustice."

In the felicitous words of Rollin C. Hurd, author of a classic treatise on the writ, "The writ of habeas corpus is the water of life to revive from the death of [unlawful] imprisonment."

Legally speaking, what exactly is a writ of habeas corpus and what are the contours of a habeas corpus proceeding?

A writ of habeas corpus is a court order directed to a custodian—typically a warden or superintendent of a prison, jail or other detention facility—commanding him to bring into court a prisoner detained in the facility and to provide an explanation as to why the prisoner is being held. The writ of habeas corpus will be issued only after the prisoner (or someone acting lawfully in behalf of the prisoner) has initiated a habeas corpus proceeding by filing in court, under oath, a written petition for a writ of habeas corpus alleging sufficient facts to warrant the conclusion that the person detained is being unlawfully restrained of his liberty. Once the prisoner is produced pursuant to the writ, the court conducts an adversary hearing at which it inquires into the validity of the prisoner's custody. Both the attorney for the detainee and the attorney for the government are permitted to present evidence and make legal arguments. The issue of the legality of the custody usually turns on whether it is in violation of the detainee's constitutional rights. The habeas corpus proceeding comes to an end when the court makes its final decision regarding the lawfulness of the custody under attack. If the court determines that the custody is lawful, the habeas petition will be dismissed and the prisoner remanded to custody. If the court determines that the custody is unlawful, it will, depending on the circumstances, release the prisoner, fix or reduce bail or grant other appropriate relief. In most American jurisdictions, this final order granting or denying relief in a habeas corpus proceeding is appealable.

In modern usage, habeas corpus may be used to attack not only the fact of detention but also the conditions of confinement. Thus, even if the petitioner is serving a lawful sentence after being lawfully convicted of crime, he may nonetheless be entitled to appropriate habeas relief from unconstitutional conditions of confinement.

An integral aspect of a judicial proceeding for freeing individuals from restraints on liberty that violate fundamental rights, the writ of habeas corpus is itself a fundamental right. Zechariah Chafee once called habeas corpus "the most valuable right in the Constitution." Indeed, the right to the writ of habeas corpus is the most widely guaranteed basic right in America. Unlike any other basic right, the right to habeas corpus is protected not only by the U.S. Constitution and federal statutes, but also by the 50 state constitutions and by statutes enacted in all 50 states. Pursuant to these authorizations, both federal and state courts may issue writs of habeas corpus. A prisoner in the custody of the federal government may seek a writ of habeas corpus only in a federal court. A state prisoner seeking habeas relief must initially apply for the writ in the state courts; if, however, relief is denied, and the custody violates the prisoner's federally protected rights, he may then apply to a federal court for the writ.

The writ of habeas corpus gets its name because originally the writ, like other legal writs, was written in Latin and directed the custodian to have the body (habeas corpus) of the prisoner in court at the time specified in the writ.

History

The writ of habeas corpus originated in England. Although it is often claimed that habeas corpus dates from Magna Carta in 1215, the writ actually is traceable to the 14th, not the 13th century. The earliest known case that is recognizable as a habeas corpus proceeding was in the Chancery Court in 1341, and by the middle of the next century, it was not uncommon for a prisoner to obtain release from illegal confinement after instituting a habeas corpus proceeding in either the Chancery Court or the Court of King's Bench. By the early 1600s, the writ was well established in England and a habeas corpus proceeding was widely acknowledged to be the appropriate remedy for unlawfully imprisoned persons seeking discharge from custody.

The writ of habeas corpus was part of the English law imported into North America by the colonists who settled here and founded the 13 colonies. The first known habeas corpus proceeding in the American colonies was in Virginia in 1682, and it is unquestionable that the colonists held the writ in high regard. In 1777, when it adopted its first state constitution, Georgia became the first state to elevate habeas corpus to the level of a constitutional right; by 1784, Massachusetts and New Hampshire had also included habeas protections in their state constitutions. Thus, in 1789, when the U.S. Constitution's habeas corpus clause (Art. I, § 9, cl. 2, providing: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it") took effect, establishing habeas corpus as a federal constitutional right, the writ was already a constitutional right in three states.

Many of the landmark individual rights decisions of the U.S. Supreme Court have been habeas corpus proceedings. Among the most notable are Mooney v. Holohan, 294 U.S. 103 (1935), which held that it is a violation of the constitutional right to due process of law to try and convict a defendant on the basis of evidence the prosecutor knows is false; Johnson v. Zerbst, 304 U.S. 458 (1938), which held that indigent federal criminal defendants are constitutionally entitled to appointed counsel; Gideon v. Wainwright, 372 U.S. 335 (1963), which held that indigent state criminal defendants are constitutionally entitled to appointed counsel; Sheppard v. Maxwell, 384 U.S. 333 (1966), where relief was granted to Dr. Sam Sheppard, who had been convicted of murdering his wife at a trial that violated due process because of prejudicial publicity; and Miller v. Pate, 386 U.S. 1 (1967), where the Court granted relief to an innocent death row inmate who had been convicted of murder based on perjured testimony (and whose execution had been stayed less than eight hours before its scheduled time).

One-Two Punch

With this background in mind, we can now take a close look at the two anti-habeas corpus statutes enacted within the past year, the Detainee Treatment (DTA), signed by President Bush on Dec. 30, 2005, and the Military Commissions Act (MCA), approved by Bush only a few weeks ago, on Oct. 17. Both statutes attempt to give legislative legitimization to the Bush administration's claim that during the war on terrorism, it may determine certain captured prisoners (including U.S. citizens) in U.S. military custody to be enemy combatants and detain them indefinitely, and that it furthermore may designate various of those prisoners who are not U.S. citizens as unlawful enemy combatants and try them before military commissions. Both statutes are also intended to curb judicial review of President Bush's widely-criticized program for imprisoning hundreds of foreign nationals, allegedly members or agents of the Taliban or Al Qaeda, in the American high-security military prison recently constructed at the U.S. Guantanamo Bay Naval Station, a 45-mile square enclave which is inside Cuba, but over which the United States, pursuant to a treaty, exercises complete control and jurisdiction. The Guantanamo detainees have been declared by Bush to be outside the protections of the Geneva Conventions; they are subject to indefinite incommunicado imprisonment; the conditions of their confinement are severe; and they have been subjected to harsh interrogation practices.

The DTA, the first of these anti-habeas corpus statutes, was passed in response to a U.S. Supreme Court decision, Rasul v. Bush, 542 U.S. 466 (2004). In Rasul, 14 foreign nationals (two Australians and 12 Kuwaitis) captured abroad and detained at Guantanamo had filed habeas corpus petitions in federal district court in Washington, DC, asserting that they had never been combatants against the United States or engaged in terrorist activity, that they had not been charged with any wrongdoing, permitted to consult with an attorney, or provided access to any court or tribunal, and that because their imprisonment was unlawful, they were entitled to be discharged from their custody. The two lower federal courts in this case interpreted the federal habeas corpus statutes to mean that federal courts lacked jurisdiction to consider habeas petitions filed by foreign nationals confined at Guantanamo. Construing those statutes differently, the Supreme Court reversed, holding that the foreign nationals at Guantanamo were not beyond the reach of the federal writ of habeas corpus and that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."

The DTA, Congress' reaction to the Rasul decision, amended the federal habeas corpus statutes by enacting 28 U.S.C. § 2241(e), which provided that no federal court shall have jurisdiction of a habeas corpus petition filed by an alien detained in American military custody at Guantanamo. The DTA did, on the other hand, authorize a Guantanamo detainee to take a direct appeal to the United States Court of Appeals for the District of Columbia Circuit from a final decision of the military that the detainee was an enemy combatant and hence liable to indefinite imprisonment. Nonetheless, by cutting back on the habeas jurisdiction of the federal judiciary, the DTA unquestionably narrowed the detainees' access to the courts; a detainee now could not turn to the courts

to complain of the detention until after the military had made a final determination that he was an unlawful enemy combatant (if it ever did); furthermore, the detainees could no longer obtain judicial review of the conditions of their confinement. The DTA also established a precedent for future legislation taking away additional chunks of the habeas corpus jurisdiction of the federal courts, a precedent followed 10 months later when Congress enacted the MCA and abrogated even more of the federal judiciary's habeas jurisdiction, some of it retroactively.

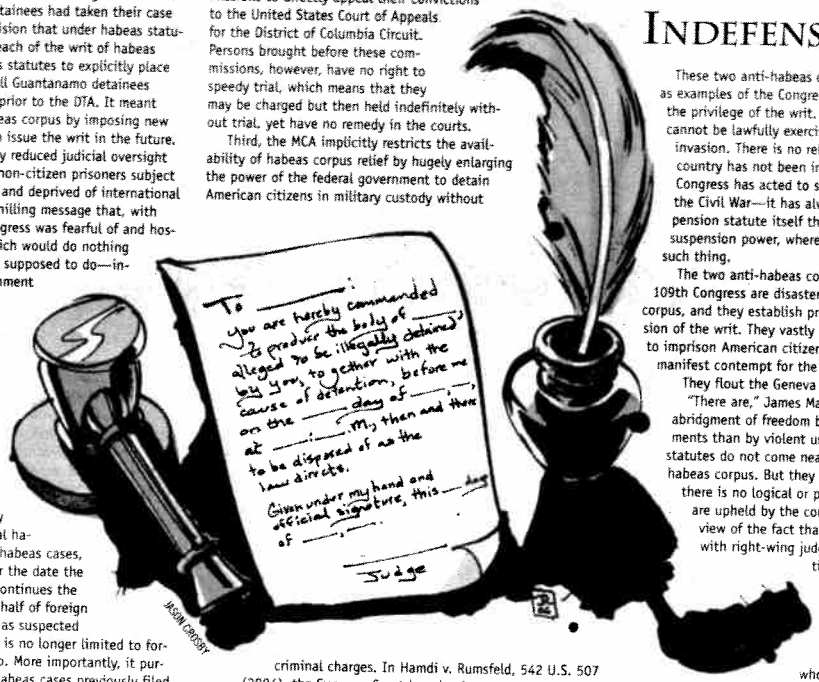
Because the DTA said nothing about habeas cases already filed, the limitations on federal habeas corpus jurisdiction created by the DTA were wholly prospective, leaving pending habeas cases (including the Rasul case itself) filed before passage of the DTA wholly untouched. Nonetheless, the DTA was still a grave error. It meant that after the Guantanamo detainees had taken their case to the Supreme Court and won a decision that under habeas statutory law they were not beyond the reach of the writ of habeas corpus, Congress changed the habeas statutes to explicitly place outside the reach of habeas corpus all Guantanamo detainees who had not filed a habeas petition prior to the DTA. It meant that Congress had meddled with habeas corpus by imposing new restrictions on the power of courts to issue the writ in the future. It meant that Congress had drastically reduced judicial oversight of a despised, powerless minority of non-citizen prisoners subject to indefinite and harsh incarceration and deprived of international human rights protections. It sent a chilling message that, with regard to Guantanamo detainees, Congress was fearful of and hostile to habeas corpus proceedings which would do nothing more than what such proceedings are supposed to do—inquire into the legality of the imprisonment and conditions of confinement.

The MCA is worse than the DTA. The MCA amends 28 U.S.C. § 2241(e), originally enacted by the DTA, so that it now provides that no federal court shall have jurisdiction to hear or consider a habeas petition filed by an alien detained by the United States who has been determined by the United States to be properly detained as an enemy combatant or who is awaiting such determination. Furthermore, the MCA specifically provides that this restriction on federal habeas corpus jurisdiction applies to all habeas cases, without exception, pending on or after the date the MCA was enacted. The MCA therefore continues the DTA's ban on habeas proceedings in behalf of foreign nationals detained in military custody as suspected enemy combatants, except that now it is no longer limited to foreign nationals confined at Guantanamo. More importantly, it purports to require dismissal of pending habeas cases previously filed by foreign nationals the government alleges to be enemy combatants. For the first time in American history, Congress has enacted a statute explicitly compelling courts to dismiss, summarily and abruptly, numerous habeas corpus proceedings already lawfully pending in court.

The MCA hobbles federal habeas corpus in several other respects. First, it provides that no person may invoke the Geneva Conventions as a source of rights in any federal habeas corpus proceeding in which the United States or a current or past federal official, civil or military, is a party. This has the practical effect of nullifying in part a long-standing provision in the federal habeas statutes under which relief may be granted from custody "in violation of the... treaties of the United States." For the first time in this country's history, courts have been statutorily prohibited from releasing persons confined in contravention of a treaty. This prohibition, it should be noted, is not limited to habeas petitions filed by foreign nationals; it extends also to habeas corpus proceedings instituted by American citizens. The MCA therefore robs all Americans of the right to obtain habeas relief from imprisonment that violates any of the four Geneva Conventions, the important, the most enlightened, the most respected, and the most widely adopted human rights treaties the world has ever known.

Second, the MCA denies federal courts habeas corpus jurisdiction in any case, including already pending cases, to hear challenges to the lawfulness of the procedures of the military commissions for trying alien unlawful enemy combatants established by the MCA. Again, Congress is compelling courts to dismiss properly filed, lawfully pending habeas corpus petitions. The MCA does, it is true, authorize persons convicted by one of these military commissions to directly appeal their convictions to the United States Court of Appeals for the District of Columbia Circuit. Persons brought before these commissions, however, have no right to speedy trial, which means that they may be charged but then held indefinitely without trial, yet have no remedy in the courts.

Third, the MCA implicitly restricts the availability of habeas corpus relief by hugely enlarging the power of the federal government to detain American citizens in military custody without criminal charges. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), the Supreme Court bought the government's war-on-terrorism argument that captured enemy combatants could be denied habeas relief and detained in military custody for the duration of hostilities and that even U.S. citizens could be so detained as enemy combatants. (The habeas petitioner in that case, Yasser Esam Hamdi, was an American citizen who had been captured in Afghanistan after allegedly taking up arms for the Taliban there. Because he was a U.S. citizen, he was imprisoned as an enemy combatant not at Guantanamo, but in a maximum security military prison in South Carolina.) The Court's rationale was that the purpose of detaining enemy combatants was to prevent captured individuals from returning to the field of battle and taking up arms once again. The Court therefore defined an enemy combatant as an individual who was part of or supporting forces hostile to the United States and who engaged in armed conflict against the United States. The MCA, however, defines an enemy combatant to be a person "who has engaged in hostilities" against the United States or "who has purposefully and materially supported hostilities against the United States." This makes it likely that in the future American citizens who have not committed any crime or ever taken up arms or fought on the field of battle—indeed, who have never left American soil—may be classified as enemy combatants by the federal government, arrested by military police, confined indefinitely in military prisons and denied habeas corpus relief by the courts. Under the MCA, in short, American citizens deemed by the government to be enemy combatants may be whisked from their homes by armed soldiers and detained in a military prison for the duration of hostilities against terrorism, unable to obtain habeas corpus relief.



INDEFENSIBLE

These two anti-habeas corpus statutes cannot be defended as examples of the Congress' constitutional power to suspend the privilege of the writ. Under the Constitution, that power cannot be lawfully exercised except in cases of rebellion or invasion. There is no rebellion in the United States, and this country has not been invaded. Furthermore, when in the past Congress has acted to suspend the writ—for example, during the Civil War—it has always expressly announced in the suspension statute itself that it was exercising its constitutional suspension power, whereas the current Congress has done no such thing.

The two anti-habeas corpus statutes recently enacted by the 109th Congress are disasters. They undermine the writ of habeas corpus, and they establish precedents for further legislative erosion of the writ. They vastly expand the power of the military to imprison American citizens not charged with any crime. They manifest contempt for the judiciary.

They flout the Geneva Conventions.

"There are," James Madison wrote, "more instances of abridgment of freedom by gradual and silent encroachments than by violent usurpations." The anti-habeas corpus statutes do not come near to totally abolishing the writ of habeas corpus. But they do stealthily encroach upon it, and there is no logical or practical reason why, if the statutes are upheld by the courts (as they probably will be, in view of the fact that the federal courts are now packed with right-wing judges), we should not expect additional, increasingly worse encroachments to be enacted by future Congresses and then validated by the courts. Certainly there will always be widely loathed, politically helpless groups or individuals here whom the government and perhaps the majority of Americans, based solely on hatred, prejudice or irrational fear, regard as extremely dangerous and deserving of being locked up permanently without interference from the courts.

Law professor Jonathan Turley recently noted that, to this nation's shame, the public was "strangely silent" as these anti-habeas corpus statutes were being debated in Congress and that their enactment produced only a "national yawn." If present trends continue, we Americans might cease dozing one day and suddenly realize that the writ for revivifying us from the death of illegal confinement has itself died, that while we were slumbering, the Great Writ suffered the death of a thousand cuts, that habeas corpus is now habeas corpse.

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