



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ Georgia Law

Scholarly Works

Faculty Scholarship

1-1-2002

The Writ of Habeas Corpus

Donald E. Wilkes Jr.

University of Georgia School of Law



Repository Citation

Donald E. Wilkes Jr., *The Writ of Habeas Corpus* (2002),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/182

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. [Please share how you have benefited from this access](#)
For more information, please contact tstriepe@uga.edu.

THE WRIT OF HABEAS CORPUS

Published in 2 Legal Systems of the World: A Political, Social and Cultural Encyclopedia 645-47 (Herbert M. Kritzer ed. 2002). The Bibliography has been updated.

A fundamental legal safeguard of freedom and the most important English common law writ, the writ of habeas corpus is a court order commanding that an imprisoned person be personally produced in court and that an explanation be provided as to why that person is detained. The writ of habeas corpus provides a judicial remedy for enforcing a fundamental individual right, the right to personal liberty, which may be defined as the right to be free of physical restraint that is not justified by law. Whenever imprisonment violates a constitutional or fundamental right, there is an infringement of the right to personal liberty.

The writ of habeas corpus receives its name because originally it was written in Latin and contained language which commanded the production of the imprisoned person by emphatically requiring the custodian (the person holding the imprisoned person in custody) to whom it was directed to habeas corpus [have the body] of the imprisoned person before the court at the time specified in the writ.

At common law in England a habeas corpus proceeding was summary and peremptory in nature and not subject to trial by jury or the elaborate rules of pleading and procedure that governed most common law civil and criminal actions. An imprisoned person seeking a writ of habeas corpus would, through counsel, file an informal written motion in the Court of Chancery or in one of the three great common law courts, the Court of King's Bench, the Court of Common Pleas, or the Court of Exchequer. The motion, usually styled "Petition for a Writ of Habeas Corpus," had to show on its face that there was probable cause to believe the petitioner was unlawfully imprisoned, and it had to be accompanied by an affidavit, under oath, supporting the allegations in the petition. If the petition did not make such a probable cause showing, or if the petition was not supported by a sworn affidavit, it would be dismissed without a hearing by the court. Otherwise the court would promptly issue a writ of habeas corpus directed to the petitioner's custodian and requiring the custodian to bring the petitioner into court and to explain the cause of the imprisonment. If the custodian, after being served with the writ, disobeyed it, he could be arrested for contempt of court. Once the petitioner was brought into court and the reason for the petitioner's imprisonment explained, the court would conduct a hearing and promptly make a determination whether the imprisonment was lawful. If it was not, the court would, depending on the circumstances, discharge the petitioner from custody, admit the petitioner to bail, or reduce the petitioner's bail. If the court determined that the petitioner was lawfully in custody, the petitioner would be remanded to custody.

An order granting habeas corpus relief was final and unappealable. If the order denied relief, the imprisoned person was permitted to file another habeas corpus petition in another court, which was required to decide whether to grant or deny relief without deferring to the denial of the previous habeas relief.

Beginning around 1800 English courts established a practice, instead of issuing a

writ of habeas corpus, of issuing an order to show cause why a writ of habeas corpus should not be granted. This procedure permitted a habeas corpus proceeding to be decided without actually bringing the imprisoned person into court, and allowed habeas corpus relief to be granted or denied without a writ of habeas corpus ever having been issued. Because of widespread adoption of the show cause procedure and other procedural changes in habeas corpus practice over the years, at present many habeas proceedings in the United Kingdom and the United States are litigated from beginning to end without a writ of habeas corpus ever actually issuing.

Historians disagree as to the time and circumstances of its earliest use, but the writ of habeas corpus undoubtedly originated in medieval times. In the 1200s and 1300s writs using the term habeas corpus were being issued by English courts and the Council to transfer prisoners from one prison to another, or to order the arrest of persons not in custody whose presence in court was required. Around 1350 we have the earliest examples of prisoners petitioning courts to bring them into court for the purpose of challenging their imprisonment, and of courts, in response to a habeas corpus petition, ordering jailors to produce a particular prisoner and to explain the cause of the imprisonment. From 1350-1400 practically all habeas corpus petitions seeking release from custody appear to have been filed in the Court of Chancery. The earliest known habeas corpus proceedings in the common law courts, instituted by prisoners filing habeas corpus petitions, were in the Court of King's Bench during the period 1450-1500. By the 1600s the writ of habeas corpus was well-established.

The writ of habeas corpus remains available in the United Kingdom (except Scotland where it has never existed). The writ is an available remedy in the major Western democracies with a common law heritage—the United States, Canada, Australia, and New Zealand. The writ is available in numerous countries formerly part of the British Empire, including the Bahamas, Bangladesh, Brunei, Ghana, India, Ireland, Israel, Fiji, Kenya, Malaysia, Mauritius, Nigeria, Pakistan, Sri Lanka, Singapore, Tanganyika, and Tanzania. The writ of habeas corpus is also available in Japan (where it was introduced in 1948 by Gen. Douglas MacArthur as Supreme Commander of American occupying forces), and in the Philippines (where it was introduced by Gen. MacArthur's father, the American military governor, in 1901).

The writ of habeas corpus provides relief from unlawful custody. The writ itself does not, however, tell us what constitutes unlawful custody. The effectiveness of habeas corpus in a given jurisdiction depends on the extent to which that jurisdiction guarantees the rights of individuals. If the jurisdiction provides few or narrow rights protections, or if habeas proceedings are hobbled by procedural technicalities, the likelihood that habeas relief will be granted is small.

Even nations which broadly guarantee individual rights may in times of national emergency restrict habeas corpus relief by suspending the writ or by declaring martial law or in some other way legalizing imprisonment which in ordinary times would be unlawful. In England between 1689 and 1882, during times of actual or likely invasion or rebellion, Parliament enacted more than forty habeas corpus suspension statutes. These statutes, which typically lasted only one year unless renewed by another 1-year suspension statute, would typically prohibit courts,

while the current suspension statute was in effect, from trying, releasing, or bailing persons jailed on certain specified charges (usually treason or treason-related offenses). In both World War I and World War II, Parliament enacted statutes authorizing, during the war, internment without trial of persons suspected of “hostile origins” or “hostile associations,” or suspected of having committed “acts prejudicial to the national defense.” With very few exceptions the English courts denied habeas relief to persons detained under these wartime statutes. During the American Civil War Congress suspended habeas corpus, and as a result in 1861-1865 thousands of Americans were imprisoned without trial in various Union fortresses and prisons for suspected “disloyalty”.

Traditionally habeas corpus relief could not be granted to persons unless their custody involved physical confinement. Today, however, many jurisdictions have relaxed the custody requirement and permit habeas relief to be granted not only to the incarcerated, but also to persons on probation or parole or at large on bail or recognizance, or otherwise subject to restraints on their freedom of movement not shared by the public generally.

In the United Kingdom the writ of habeas corpus remains a common law writ, and is principally used to challenge pretrial custody on criminal charges, or custody pursuant to immigration or deportation statutes or extradition agreements, or military custody or detention in mental hospitals. From 1975-2000 the number of habeas petitions filed each year in the United Kingdom has averaged less than 100.

In the United States the writ of habeas corpus is a constitutional right guaranteed by art. 1, § 9 of the United States Constitution and by various habeas corpus provisions in the constitutions of all fifty states. In addition, federal statutes authorize the federal district courts to grant writs of habeas corpus, and in each of the fifty states there is state legislation authorizing state courts to issue writs of habeas corpus.

In the United States habeas corpus is often used to attack pretrial custody on criminal charges—to seek release on bail, to raise speedy trial or double jeopardy claims, to attack unconstitutional conditions of confinement, or to contest interstate extradition. But the most common use of habeas corpus in the United States is as a postconviction remedy, challenging custody pursuant to a criminal conviction on grounds the conviction or the sentence was obtained in violation of a constitutional or other fundamental right, or on grounds unrelated to the validity of conviction and sentence, as where the convicted person’s parole was unlawfully revoked or denied or where the conditions of confinement are unconstitutional.

In twelve states—California, Connecticut, Georgia, Nevada, New Hampshire, New Mexico, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia—the writ of habeas corpus is the principal postconviction remedy. In the other thirty-eight states the principal postconviction remedy is a motion for postconviction relief (filed in the convicting court), which has been created to replace habeas corpus with a remedy of equivalent scope to be used in lieu of habeas corpus.

In the United States the federal district courts are authorized to grant habeas corpus relief to persons who are in state custody pursuant to a state court conviction where the conviction or sentence was obtained in violation of a federal

constitutional right or the custody violates such a right on grounds not related to the conviction or sentence. In recent years the federal habeas corpus remedy for state convicts has fallen under attack. Since around 1972 in both capital and noncapital cases the United States Supreme Court has weakened the effectiveness of the remedy by restricting the number and scope of federal constitutional rights, and by erecting procedural obstacles that often prevent the merits of habeas petitions from even being considered. In 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act, further diluting the power of federal courts to grant habeas relief to state prisoners, including those sentenced to death.

From 1996-2000 nearly 110,000 habeas petitions were filed in the federal courts. Nearly 25,000 were filed in 2000 alone.

Federal district courts in the United States may also grant writs of habeas corpus to persons in federal custody, pursuant to a federal court conviction, if the conviction or sentence was obtained in violation of a federal constitutional right. However, since 1948 federal statutory law has required most federal prisoners who seek habeas relief from their federal conviction or sentence to refrain from filing a habeas petition and to instead proceed by filing a motion for postconviction relief in the convicting court. The statutory motion procedure is designed to furnish a remedy equivalent in scope to habeas corpus and is governed by habeas corpus principles. From 1996-2000 federal convicts filed nearly 40,000 of these postconviction motions in the federal courts, including around 6,300 in 2000.

BIBLIOGRAPHY

Clark, David, and McCoy, Gerard. 2000. *The Most Fundamental Right*. Oxford: Clarendon Press.

Duker, William J. 1980. *A Constitutional History of Habeas Corpus*. Westport: Greenwood Press.

Federman, Cary 2006. *The Body and the State*. Albany: State University of New York Press.

Freedman, Eric. M. 2001. *Habeas Corpus*. New York: New York University Press.

Hussain, Nasser 2003. *The Jurisprudence of Emergency*. Ann Arbor: University of Michigan Press.

Lyon, Andrea D., Hughes, Emily, and Prosser, Mary 2005. *Federal Habeas Corpus*. Durham: Carolina Academic Press.

Sharpe, R. J. 1989. *The Law of Habeas Corpus*. Oxford: Clarendon Press.

Wilkes, Donald E., Jr. 1996. *Federal Postconviction Remedies and Relief*. Norcross: The Harrison Company.

Wilkes, Donald E., Jr. 2007. *Federal Postconviction Remedies and Relief Handbook*. New York: Thomson West.

Wilkes, Donald E., Jr. 2001. *State Postconviction Remedies and Relief*. Suwanee: The Harrison Company.

Wilkes, Donald E., Jr. 2007. *State Postconviction Remedies and Relief Handbook*. New York: Thomson West.

Yackle, Larry W. 2003. *Federal Courts: Habeas Corpus*. New York: Foundation Press.

See also: Symposium, *The Great Writ: Developments in the Law of Habeas Corpus*, 91 Cornell L. Rev. 259 (2006).