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Habeas Corpus: Its Importance, History, and Possible Current Threats

Joshua W. Clark

Senior Honors Project

Abstract: One of the greatest protections against tyranny to ever develop within the common law was the powerful writ of Habeas Corpus. Unfortunately, this writ sometimes causes inconvenience to the executive's attempts to enforce the law, especially during times of war, leading the government to be tempted to suspend the writ for insufficient reasons. This paper endeavors to explicate the importance of the writ of habeas corpus, examine a current suspension of it, and show why that suspension has been based upon insufficient constitutional grounds. Finally, this paper closes by examining some of the dangers inherent in this unjustified revocation of habeas corpus.

The common law's ancient writ of Habeas Corpus is one of the most important defenses available against tyranny. Habeas Corpus, translated literally from Latin, means "you have the body." By issuing a writ of habeas corpus, a judge or court may compel those holding a prisoner to produce the prisoner and prove that they have legally incarcerated the individual. This power is an important check against an inordinate concentration of power in the executive branch as it allows the judiciary to challenge illegal detentions which have always been favorite tools of intimidation used by dictators and despots throughout history. Because of the importance of this writ, even a legitimate abridgement of this power or of the right to petition it should be met with a highly critical eye and subjected to the most stringent standards of evaluation.

In the current "war on terror," certain actions by the Bush administration have been debated in both the Congress and the courts, and have led to a limited suspension of the habeas corpus rights of some people detained in military operations and anti-terrorism investigations. The greatest number of the prisoners in question is the group of men being held at the United States military base in Guantanamo Bay, Cuba. When it became

apparent that there was no plan to release any of these men at a definite future date, petitions for writs of habeas corpus were filed on behalf of this group. The outcome of this case, and subsequent cases, has led to the passage, in late September of this year, of the Military Commissions Act of 2006. Among the many provisions of this bill is a provision which declares that "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States"[1] if that alien meets certain conditions prescribed by the bill. As with any suspension of habeas corpus, this instance should cause us to pause and carefully question the constitutionality of this action.

In order to begin examining the constitutional legality of this act, it is important to review the development of the modern concept of habeas corpus in order to understand this writ and its importance. The American doctrine of habeas corpus finds its origin in the common law which was brought to this country from England. In his commentaries on the Laws of England, Sir William Blackstone credits the origins of the principles behind the writ of habeas corpus to the ancient Saxons who conquered England shortly after the Roman Empire withdrew from the British Isles.[2] Blackstone said that the great importance of the writ of habeas corpus lay in its protection of the liberty of individuals. According to Blackstone, all men were endowed by God with three great rights: the right

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[1] *Military Commission Act 2006*, Section 7, e (17 October 2006).

[2] Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago, The University of Chicago Press, 1979), 435.

to personal security, the right to liberty, and the right to property[3]. The entire aim of society and government was to protect these three rights.[4]

Because these rights were so fundamental, Blackstone said that they could not be taken by force, even for the sake of the public good, but only willingly surrendered by an individual or by his representatives.[5] This was why, according to Blackstone, only parliament, being a body representative of the people, could legitimately pass laws that would lead to the incarceration of individuals, and parliament was also the only body which could legitimately abridge the right of British subjects to petition for a writ of habeas corpus.[6] As proof of these assertions, Blackstone offered the Magna Carta's declaration that "No free man shall be seized or imprisoned...except by the lawful judgement of his equals or by the law of the land."[7] He also cites the parliament's passage of "that great bulwark of our constitution, the habeas corpus act,"[8] as the parliament's assertion that neither the king, nor any other executive could in any wise revoke the right to petition and receive a writ of habeas corpus.

When the United States' Constitution was composed, the founding fathers ensconced this writ and its common law protections in the first article of the Constitution, not even wanting to wait until after the constitution was ratified as they did with every other right which is listed and protected in the Bill of Rights. According to the first

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[3] Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Chicago, The University of Chicago Press, 1979), 125.

[4] *Ibid*, pg. 120.

[5] Sir William Blackstone, vol. 1, pg. 135.

[6] *Ibid*, pg. 132.

[7] *Magna Carta*, Clause 39, 1215.

[8] Sir William Blackstone, vol. 4, pg. 431.

article, section 9 of the United States Constitution, "The privilege of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." By placing this provision in the first article of the constitution, the founders allowed only the Congress to hold the power to suspend the privilege of habeas corpus. Even then, they severely limited this power by the statement that it should never be exercised except when national safety demanded it in cases of insurrection or invasion, thus setting a very high standard which any such abridgment of this writ must meet.

In spite of the clarity of both the common law and the United States' Constitution, the writ of habeas corpus has not always been well respected or heeded. Still the courts have resisted these abuses and used them as opportunities to state, painfully clearly, the bounds of executive authority over the writ. Perhaps the worst and most dramatic of these abuses occurred during the Civil War. During the war, many northern Democrats opposed the Lincoln administration's actions as unconstitutional and wrongfully aggressive. These "Peace Democrats," or "Copperheads" as their opponents called them, would oppose the war both with speeches in legislative gatherings and in public, and by organizing demonstrations and protests against the war and the draft. Because these Democrats were causing so much disruption, the Lincoln administration began having them arrested by the military and held either without trial or held and tried by a military court. This was accomplished by President Lincoln's declaration of Martial Law in many areas and his unilateral order that the privilege of habeas corpus was suspended.

This situation came to the attention of the courts early in 1861in the case of John Merryman. According to the opinion Ex parte Merryman, John Merryman was arrested without a warrant at two o'clock in the morning on the 25th of May in 1861. Merryman

was then held without trial in Fort McHenry under charges for which neither proof nor accusers were offered. When Chief Justice Roger B. Taney, then sitting on the Circuit Court for Maryland, issued a writ of habeas corpus, the commanding officer of the fort informed him that President Lincoln had suspended habeas corpus and that John Merryman would not be delivered to the court.

In response to this arrogant usurpation of the legislature's sole authority to temporarily suspend habeas corpus, Justice Taney issued his opinion Ex parte Merryman. In this opinion, the justice traced the common law origins of habeas corpus, showing that it was always held that only the Parliament could suspend the writ; He also noted that this was the plain understanding of the Constitution's provision of when congress might suspend the writ. The Justice then went beyond simply demonstrating that the suspension of habeas corpus was a legislative issue and began to show why it should never be an executive one. He did this by listing and discussing some of its past abuses in England during such times as the English Civil War. He then memorably concluded that:

> "No one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender."[9]

Unfortunately, the Lincoln Administration and its army ignored this decision, as well as many similar, subsequent decisions which ordered it to cease these illegal arrests

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[9] Taney, Roger B.: *Ex parte Merryman*, April 1861.

and incarcerations. For the next two years, Lincoln asked Congress to pass measures authorizing his suspension of habeas corpus, but Congress refused to do so. Eventually, in 1863, the Congress passed such an act, baptizing Lincoln's longstanding illegal actions with an air of Constitutional legitimacy.[10]

In 1866, after the war had ended, the Supreme Court heard and decided the case Ex parte Milligan. This case dealt with the trial and conviction of Lambdin P. Milligan and his accomplices who had been arrested after the passage of the 1863 act, and who had been tried by a military court. The opinion in this case stated that while the detentions were legal at the time of the arrests and during the war, the trials of Milligan and his associates were illegitimate because they were conducted by military courts which did not have jurisdiction over civilian citizens because, in spite of the declaration of martial law, the normal court system was still functioning.[11] While explaining this decision, the court also stated that during the war, the revocation of the writ of habeas corpus was permissible because questions of public safety "did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question," but that "now that public safety is assured, this question, as well as all others, can be discussed and decided."[12] This case, therefore, is considered to be the decision that reinstated habeas corpus after the war.

After the Merryman and Milligan cases, while there were some minor developments in the doctrine of habeas corpus, mostly dealing with procedural questions such as the applicability of the writ to prisoners taken and held outside the territory of the

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[10] *Habeas Corpus Suspension Act of 1863*, 3 March 1863

[11] Justice Davis, Majority Opinion: *Ex parte Milligan*, 3 April 1866.

[12] Justice Davis, Majority Opinion: *Ex parte Milligan*, 3 April 1866.

United States, there were few major disputes until after the attacks of September 11th, 2001.

In the months following this terrorist attack, the United States invaded the country of Afghanistan, then ruled by the Taliban movement's jihad sanctioning government. In the course of this invasion, many prisoners were taken. Those who were deemed to be the most valuable to the United States' struggle to destroy the al-Qaeda terrorist network were taken to the Military Base at Guantanamo Bay, Cuba. These detainees were not classified as prisoners of war because the Bush administration did not wish to have to abide by the regulations of the Geneva Conventions as they related to such prisoners, or to try them according to the rules of a formal military court marshal. Neither did the administration wish to try these men in the civilian court system where standards of evidence would make a conviction doubtful without ruining the effectiveness of the nation's evidence-gathering apparatus. The administration, therefore, declared that these prisoners were a new, third type of prisoner which they termed "illegal enemy combatants." These "illegal enemy combatants" were then claimed to have no rights under either the laws of the United States or under the Geneva Conventions.

The Bush administration might have continued holding these men indefinitely had not petitions for writs of habeas corpus been made on their behalf. The result of these petitions, in time, was the Supreme Court's decision in the case of Shafiq Rasul, et al. v. George W. Bush. In this case, the Bush administration argued that the United States' court system did not have jurisdiction to issue writs of habeas corpus for the Guantanamo prisoners since the base at Guantanamo Bay was, according to the technical wording of the treaty which leased the land to the United States, still the property of Cuba. The

Court maintained, in this case, that it still held jurisdiction over the habeas corpus rights of detainees at the Guantanamo base because the United States still exercised "exclusive jurisdiction and control" over the base.[13] Because the Supreme Court had held that United States Courts did have the jurisdiction to hear habeas corpus cases, the Bush administration sought to create a way to try the detainees which would meet both its desire for convictions and the court's probable demands for due process.

In 2005, the administration obtained passage of the Detainee Treatment Act of 2005. This act set very loose rules on the treatment of detainees at Guantanamo and other facilities as well as authorizing the defense department to come up with rules for organizing military tribunals to try detainees.[14] The bill also attempted to prevent the courts from challenging its legitimacy by declaring that no United States courts or judges would have jurisdiction to hear petitions for writs of habeas corpus.[15]

This law received its challenge in 2006, soon after it was passed, when the Supreme Court heard the case of Salim Ahmed Hamdan v. Donald H. Rumsfeld. Salim Hamdan is a Yemeni who was captured in Afghanistan and held at Guantanamo Bay, Cuba. He was one of the first who was selected to be tried by military tribunal. Hamdan filed a petition for a writ of habeas corpus, claiming that he was being held illegally and tried contrary to the laws of war. Rather than examine the legitimacy of the Detainee Treatment Act's revocation of Guantanamo detainees' habeas corpus rights, the Supreme Court held that they had jurisdiction to hear the Hamdan case because it was already

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[13] Justice Stevens, *Rasul v. Bush*, 28 June 2004.

[14] *National Defense Authorization Act for Fiscal Year 2006*, Title 10 (*Detainee Treatment Act of 2005*), Section 1005, (6 January 2006).

[15] *Ibid.*

pending when the Detainee Treatment Act took effect and the habeas corpus provision of that act was not written to be retroactive. The Court then declared that the Military Commissions were unconstitutional, as they had been constituted, because they had been organized by and had their rules written by the Defense Department rather than by the Congress, and because their procedures and charges were different from those sanctioned in either the Uniform Code of Military Justice, or the Geneva Conventions.

In response to this decision the Bush administration pushed Congress for speedy passage of the Military Commissions Act of 2006. This act attempted to take care of each of the reasons that the Supreme Court gave for its Hamdan decision. First, it clearly defined the new status of "illegal enemy combatant" and described the process for determining if any non-citizen detainee could be classified as such.[16] The bill also set up the exact procedures and standards for the operation of military commissions to try illegal enemy combatants and defined a new set of charges which would be available for such commissions to try.[17] The act also declared that the Geneva Conventions could no longer be invoked in any habeas corpus action against the United States or any personnel in its employ.[18] Finally, the act sought to insure that no court could ever challenge the detentions of these "illegal enemy combatants" by declaring that:

> "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United

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[16] *Military Commission Act 2006*, Section 2 and 3.

[17] *Military Commission Act 2006*, Section 4.

[18] *Military Commission Act 2006*, Section 8.

States to have been properly detained as an enemy combatant or is awaiting such determination."[19]

Such a broad declaration, if accepted by the Court, makes it impossible for United States courts to hear almost any habeas corpus petition from a non-citizen detainee since all that government lawyers would need to do is claim that the detainee was awaiting a military commission's determination that he or she was an "illegal enemy combatant." This is, therefore, far more broad than simply revoking the habeas corpus rights of a small group of internationals. In effect, this bill revokes the privilege of the writ of habeas corpus from any non-citizen of the United States that the government wishes to hold because it simply takes a word to declare that a person is eligible to be stripped of this right.

To evaluate the legality of this decision we must first evaluate whether non-citizens of the United States may be properly considered to be beneficiaries of the protections provided by the privilege of habeas corpus. Because the right of habeas corpus is so vital to the protection of liberty—the second of the great, inalienable rights of all men listed by not only William Blackstone, but also by our own Declaration of Independence—we may guess that the founders may not have intended it to be limited to citizens only. Evidence of this can be seen in the fact that the Constitution does not differentiate between the habeas corpus rights of citizens or aliens. Furthermore, even if the founders intended some type of separation in these rights, the Fourteenth Amendment would seem to extend the protection of this right with its statement that no state shall "Deny to any person within its jurisdiction the equal protection of the laws."

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[19] *Military Commission Act 2006*, Section 7, e.

In addition to these Constitutional arguments, United States Code's division 28, section 2241 formally grants the judicial branch the authority to grant writs of habeas corpus in certain cases involving foreign nationals. Finally, and of the most recent importance, the Supreme Court's decision in the case of Rasul v. Bush declared that the Supreme Court saw a constitutional, statutory, and common law precedent for granting the protection of the privilege of habeas corpus to non-citizens within the bounds of the territory of the United States.

Because the Constitution, as well as the laws of the land and the Supreme Court's interpretation of the Constitution all seem to agree that non-citizens are protected by the privilege of habeas corpus, we must now evaluate whether the privilege itself was legally revoked. According to the first article of the United States' Constitution, section 9, "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." As was noted in ex parte Merryman, the first requirement of this section, by virtue of its logical placement within the first article of the Constitution, and within that article's list of limits on the power of the legislature, is that the legislature alone may revoke the right of habeas corpus. This first requirement has been met in the case of both the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 as the revocation of habeas corpus in both instances was authorized by the legislature rather than ordered by the President.

The second and explicit textual requirement of Article 1, Section 9 is that the legislature may exercise its power only in cases when insurrection or national invasion make such a suspension a necessity of national safety. When it comes to determining the necessity of an action, such as the public need of a taking, the tendency of the Supreme

Court has been increasing deference to Congress. It seems unlikely, therefore, that the Court will attempt to take up the question of the appropriateness of the Congress's decision that there is currently a state of invasion which necessitates this suspension of habeas corpus. In spite of this likely deference to Congress, such an evaluation remains a legitimate line of inquiry about the constitutionality of this present suspension of the privilege of habeas corpus.

Supporters of the Military Commissions Act will argue that national safety requires this abridgement of rights because the United States is trying to fight a kind of invasion. These people argue that this invasion, while being of a hidden and insidious nature, is being conducted by an unknown number of terrorist cells. They argue that the only way to stem this invasion is to detain suspects long enough to determine whether they are a threat and then to hold them until they cease to be such threats. To further justify such a determination that the United States is under a state of invasion, supporters of this bill will likely point to the fact that these cells are not only supported by the infrastructure of the al-Qaeda terrorist organization, but also encouraged by small nations which have the goal of boosting their national power relative to that of the United States. By virtue of these arguments, supporters of the Act will claim that the United States is suffering from a hidden, but real invasion, the threat of which justifies this exercise of power by the legislature.

Opponents of this act, however, will likely counter these arguments by saying that describing this present conflict as an invasion of the nation is a misnomer. These people would point out that even the terrorist organizations such as al-Qaeda do not have the type of coherent goal that would define an invasion by a foreign nation. Instead, these

are simply loose associations of wicked men who wish to murder American civilians for goals which vary from breaking our will to support Israel to gaining personal salvation. Although these terrorists claim to all be bound in one organization, they are, in reality, many separate individuals and groups, each of which will be replaced by another once removed. These isolated, ideologically motivated groups will likely continue attempting to attack the United States for years into the future, attacking in a random and haphazard pattern resembling the workings of a common criminal rather than in a way that could be considered part of a concerted effort to invade the United States. Thus, it can be argued that since these attacks are not part of a concerted, coherent invasion, they should not be treated or opposed as such by suspending the privilege of habeas corpus.

As can be seen from the arguments on both sides of this issue, whether the actions of groups such as al-Qaeda qualify as an invasion of the United States resolves, in large part, to a semantic argument over what constitutes an invasion, whether it be the simple literal definition of foreign nationals trying to gain entry to a country to do it some harm, or a more nuanced definition that examines the goals and organizations of these attackers. This semantic argument places the exact legality of this action in a somewhat undefined, gray area of the law unless one of these definitions can be decided upon. Ex parte Milligan offered some the following observations evaluating the appropriateness of the revocation of habeas corpus by Congress during the Civil War, as well as the Court's reason for reinstating the right:

> "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety

were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment."[20]

Later in the Court's opinion, it stated that its reason for striking down the use of military trials to try civilians during the war was based on the fact that while the war had caused enough disruption to justify the revocation of habeas corpus, it had not disrupted the court system to such an extent that it was unable to try cases.[21] If we take these two items together, they point to the determination that this current conflict does not qualify as an invasion that would authorize the suspension of habeas corpus because, while there is some extant threat to the safety of individuals within the United States, this threat has not disrupted the courts' ability to try cases, or to hear and consider petitions for habeas corpus from citizens or from non-citizens lucky enough to not be classified as "illegal enemy combatants."

For these reasons, if the courts were to subject the Military Commissions Act of 2006 to such stringent tests of constitutionality, they would likely come to this same conclusion: that the law does not fully meet the Constitution's requirement that habeas corpus only be suspended in times of invasion or insurrection. However, it is unlikely that the Supreme Court will take up this question since it avoided this issue in its decision of Hamdan v. Rumsfeld, allowing the Detainee Treatment Act of 2005's revocation of habeas corpus to stand—choosing, instead, to use a loophole in the Detainee Treatment

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[20] Justice Davis, Majority Opinion: *Ex parte Milligan*, 3 April 1866.

[21] *Ibid.*

Act which failed to revoke the habeas corpus rights of prisoners who had already filed cases with lower courts.

The reason for the court's choice to avoid this topic is likely a result of its aforementioned tendency to defer to the judgments of Congress. This deference will likely cause the courts to allow the Military Commissions Act of 2006 to stand unless it finds some other small loophole through which to challenge the act. Unfortunately, in this case, such deference is very dangerous, not only for those who will lose their habeas corpus and other due process rights directly from this bill, but also for the rest of society.

The greatest danger of this act is that if the courts allow this act to stand, its weak definition of what type of invasion might justify the suspension of habeas corpus will become legal precedent. This same definition could then be used as authorizing the suspension of the habeas corpus rights of all non-citizens, and finally of citizens themselves. It is not likely that such a shift would occur very quickly, but to think that this definition would not be used to broaden the scope of the suspension of habeas corpus to include citizens is naïve; such a shift could only require one or two modest sized terrorist attacks carried out by homegrown terrorists to be widely accepted by the public.

The second danger of this action is that it makes Americans comfortable with the idea of surrendering rights for a long, possibly endless period of time. From the time of Blackstone, the suspension of habeas corpus was thought to be only a temporary suspension,[22] never an endless revocation like that which this present law seems to establish. The very idea of surrendering any right for more than the shortest of temporary periods should be repugnant to freedom-loving Americans, but because it is not our rights which we are sacrificing, but rather those of aliens, most Americans are all too

[22] Sir William Blackstone, vol. 1, pg. 132

comfortable with this provision. Sadly, the longer Americans live allowing the rights of others to be impinged indefinitely, the more easily they will relinquish their own hard-won rights for indefinite periods of time. When this tendency is combined with the risk of defining invasion too loosely, the result could be the complete loss of all habeas corpus rights in the space of a couple of decades.

Such a loss of the privilege to petition for a writ of habeas corpus would doubtless be the harbinger of tyranny since this writ is the last peaceful defense of personal liberty. It is therefore vital that we carefully evaluate this act and any other attempt to limit the right to petition for a writ of habeas corpus. Any act that does not fully meet the standards set forth in the Constitution should be opposed vigorously, for to do otherwise, even if we only surrender the rights of a small group of non-citizens, is to gamble for marginal benefits in public safety using the precious capital of the liberty of future generations; generations which would be forced to live in whatever tyranny we might accidentally create to protect ourselves.

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