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## *Quo Vadis, Habeas Corpus?*

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*United States District Court for the District of Columbia*

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## 2007 JAMES McCORMICK MITCHELL LECTURE

### *Quo Vadis, Habeas Corpus?*<sup>1</sup>

JAMES ROBERTSON†

The poster that advertised this lecture emphasized two decisions of mine that brought down upon me my allotted fifteen minutes of fame, but Professor Steinfeld<sup>2</sup> was quite discreet when he extended the University's invitation last March: he did not ask me to discuss either my opinion in the Guantánamo Bay case<sup>3</sup> or my resignation from the Foreign Intelligence Surveillance (FISA) Court.<sup>4</sup> What he did, instead, was advise me that the very first Mitchell Lecture, given here 56 years ago by Justice Robert H. Jackson, was entitled *Wartime Security and Liberty Under*

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1. The 2007 James McCormick Mitchell Lecture, University at Buffalo Law School, March 21, 2007.

† United States District Judge for the District of Columbia. The helpful comments of Judge Louis F. Oberdorfer and the invaluable assistance of Emily Coward, Jonathan Olin, and Joel Meyer are gratefully acknowledged.

2. Robert J. Steinfeld, Robert and Karen Jones Faculty Scholar and Professor and Chair, Mitchell Lecture Committee, University at Buffalo Law School, The State University of New York.

3. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

4. See, e.g., Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits in Protest*, WASH. POST, Dec. 21, 2005, at A1.

*Law*,<sup>5</sup> and suggest that I might wish to speak on a similar subject. I have never said anything to anybody about my resignation from the FISA court, however, at least not publicly, and I don't plan to start now. And it would be improper for me to discuss or comment upon the *Hamdan* case, which is still pending, or, should I say, pending again. And so what I told Professor Steinfeld was that I would talk more abstractly: about that three-vector force diagram of our government that we call checks and balances—about the ambitions of presidents to power, the fecklessness of the legislature, and the limitations upon the judiciary to do anything much about the other two branches. What happened, in other words, to checks and balances? Then, a few months later, last July, the Supreme Court declared in *Hamdan v. Rumsfeld*<sup>6</sup> that the President had indeed overstepped his powers at Guantánamo, and it challenged Congress to wake up and act. That decision, and what it brought about, gave us all a civics lesson in checks and balances—not the one we had hoped for, perhaps, but a lesson nevertheless, and a lesson as well in the law of unintended consequences. Congress not only authorized the Executive to conduct trials by military commission at Guantánamo Bay, but, *en passant*,<sup>7</sup> it also stripped the federal courts of their statutory jurisdiction to hear habeas corpus petitions or any other actions filed by aliens who are detained as enemy combatants or who are even awaiting a determination of whether or not they are enemy combatants.<sup>8</sup> So much for what I had thought was the fecklessness of the legislature!

One of the consequences of this intense little piece of American legal history has been to reveal how little understood is the writ of habeas corpus, even by Congress (or, perhaps, especially by Congress); and, despite the lofty language of Blackstone and the rhetorical flourishes of Supreme Court opinions about habeas corpus, how much

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5. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103 (1951).

6. 126 S. Ct. 2749 (2006).

7. This chess metaphor is apt, if one considers district judges to be pawns who forgot their place.

8. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36. Section 7(a) is the jurisdiction-stripping provision.

the writ is at risk of becoming a rather impotent legal anachronism. The Great Writ of habeas corpus, “esteemed” by the Supreme Court as “the best and only sufficient defence of personal [liberty],”<sup>9</sup> and considered by Blackstone to be a “second magna carta,”<sup>10</sup> has been reduced in our own time to a procedural quagmire for jailhouse lawyers, and it has been treated by the judiciary, I fear, as something of a nuisance.

The history of the writ that came to our shores with English settlers is interesting for its own sake, but you may be startled by its parallels with what is happening today. As I outline that history—and I can only outline it—I will try to demonstrate that, for three hundred years, habeas corpus has been a reliable barometer for observing changes in the atmosphere of liberty, and also, if you will forgive the mixed metaphor, a voltmeter (or maybe I mean an ammeter)—a device, in any event, for measuring the distribution of power between and among the three branches of our national government.<sup>11</sup> I will also have a few words about the future of habeas—not predictions, but suggestions, or, perhaps, wishes.

## I. ENGLISH ORIGINS OF HABEAS CORPUS

Some commentators seem to believe, without having consulted either Google or Wikipedia, that the writ of habeas corpus was mentioned in, and dates to, Magna Carta. It was not, and it does not. Magna Carta, as we all know, was a document King John’s barons more or less forced him to sign in a meadow at Runnymede in the year 1215. Known today as the Charter of Freedom, it contained many concessions by the King, promising, among other things, that

[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [the royal we] proceed with force against him, or send others to do so, except by the lawful

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9. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

10. WILLIAM BLACKSTONE, 1 COMMENTARIES \*138.

11. Now seems to be an especially appropriate time to consult this barometer. See generally FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007).

judgment of his equals or by the law of the land.<sup>12</sup>

The King signed with his fingers crossed behind his back, having no intention of keeping that promise or any of the other fifty or sixty set forth in the document, but Magna Carta outlived him and was the seed from which grew both parliamentary government and the Rule of Law. As the great English historian Trevelyan wrote, Magna Carta's "historical importance lay not only in what the men of 1215 intended by its clauses, but in the effect which it has had on the imagination of their descendants."<sup>13</sup> No, habeas corpus was not present at Runnymede. It is fair to say, however, that, nearly four hundred years later, habeas corpus *gave effect* to Magna Carta.

Other commentators seem to think, without having consulted their Latin dictionaries, that the words "habeas corpus" mean "produce the body."<sup>14</sup> The literal words do not. They mean, "you have the body."<sup>15</sup> They were the introductory words of a writ, or formal document, usually under seal, addressed by a judge to a jailer or to someone having custody of a prisoner. Perhaps Professor Bozer or Professor Baumgarten<sup>16</sup> has the full text of an actual writ of habeas corpus from medieval times—I have never been able to find one—but the gist of it was something like this: "You have the body of William. Bring him to me, in three days time, and show me what legal cause you have for detaining him." That at least, was the writ as it had evolved by the late sixteenth century. And evolution is the right concept,

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12. British Library Treasures in Full: Magna Carta – English Translation, <http://www.bl.uk/treasures/magnacarta/translation.html> (last visited Sept. 28, 2007).

13. GEORGE MACAULAY TREVELYAN, HISTORY OF ENGLAND 172 (1926).

14. See, e.g., Public Citizen, Get the FAQs on Habeas Corpus: Frequently Asked Questions, [http://action.citizen.org/content.jsp?content\\_KEY=2358](http://action.citizen.org/content.jsp?content_KEY=2358) (last visited Sept. 24, 2007) ("Habeas Corpus means 'produce the body.'").

15. This worked better in a lecture hall than it does in a scholarly journal. My own Latin dictionary was actually no help. I relied upon my schoolboy Latin, and I now freely acknowledge that, in some long-forgotten declension of the verb (*habeo, habere*), "habeas" may be a command, as in "have him here."

16. Alan J. Bozer is an adjunct lecturer, and Mary C. Baumgarten an adjunct instructor, at the University at Buffalo Law School, The State University of New York. They teach L-812 "The Great Writs and Post-Conviction Remedies."

not intelligent design: habeas corpus had existed for a couple of hundred years, but as a lower order of writ—a piece of paper compelling someone to move a prisoner from one place to another.<sup>17</sup> It was not until the reign of Elizabeth I that habeas corpus began to be recognizable as what one scholar has called “a palladium against arbitrary government,”<sup>18</sup> and it was another hundred years before it became the Great Writ.

In 1587, Frances Walsingham, a member of Elizabeth's Privy Council, ordered the detention of a man named Hellyard. Treason was afoot—it was Walsingham who, in the same year, perhaps even as part of the same investigation, discovered a plot to kill Elizabeth and learned that Mary Queen of Scots was “acquainted” with it<sup>19</sup>—which was why Mary lost her head. (It is tempting to name modern-day avatars for Walsingham and for a number of other characters in this story, but I will resist the temptation.) Application was made on Hellyard's behalf for a writ of habeas corpus. The question was not whether the writ would issue—that was virtually automatic, and immediate—in those times a judge presented with an affidavit was required to act immediately<sup>20</sup>—but issuance of the writ only started the process. The question was, what cause Walsingham would give for Hellyard's detention when he made his return. Walsingham's return said, essentially, “I, Walsingham, am the principal military secretary of Her Majesty's household, and the prisoner was committed at my order.” That pomposity was held, by some

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17. See Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 378 (1998) (noting that the purpose of the original writ of habeas corpus was “firmly established by 1230' as a procedural writ to bring people . . . before the court”).

18. WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 40 (1980) (“The fiction that the writ of habeas corpus provided the English subject with a palladium against arbitrary government pressed closer to reality when the courts of common law began to resist what they perceived as interference from the Privy Council.”).

19. See TREVELYAN, *supra* note 13, at 352.

20. See Allen E. Shoenberger, *The Not So Great Writ: The European Court of Human Rights Finds Habeas Corpus an Inadequate Remedy: Should American Courts Reexamine the Writ?*, 56 CATHOLIC U. L. REV. 47, 54 (2006) (“Indeed, the court itself, including the lord chancellor, lord keeper, any judge, or baron, was potentially liable to the prisoner for five hundred pounds for denial of a required writ of habeas corpus.”).

long forgotten but courageous judge, to be an insufficient reason; Hellyard was ordered released.<sup>21</sup>

I call the judge in *Hellyard's Case*<sup>22</sup> courageous because, in his time, there was really only one branch of government that counted. Judges served at the pleasure of the Crown, and "feckless" did not begin to describe the timidity of Parliament. Forty years later, though, after Elizabeth was gone, and her successor James I was gone, and young King Charles I was on the throne, it was a different story. Almost as soon as Charles was crowned, he involved England in a series of "warlike expeditions" against the France of Cardinal Richelieu and against Spain.<sup>23</sup> "The wars, such as they were," wrote Trevelyan, became a "tale of folly and disaster," and "lowered the prestige of [the] monarchy in England, and brought the Crown into fierce conflict with the House of Commons."<sup>24</sup> By 1628, less than three years after his coronation, Charles had accumulated a stack of grievances in Parliament. He had forced merchants and even noblemen to loan money to the Crown, he had quartered troops among the populace, he had authorized arbitrary arrests, he had people thrown in prison in violation of Magna Carta. Parliament had had enough. It prepared and delivered to Charles a document that came to be known as The Petition of Right.<sup>25</sup> The Petition of Right asked that no one be imprisoned without a showing of cause, that habeas corpus be available in all cases to examine the cause, and, if a writ were returned without cause, that the prisoner be released—even if he had been committed by order of the King himself or by the entire Privy Council.

The King agreed to The Petition of Right in Parliament, but he almost immediately disavowed it. His attorney general said that the petition was not law, and that it was

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21. See DUKER, *supra* note 18, at 41 (citing Hellyard's Case, (1587) 74 Eng. Rep. 455 (C.P.)).

22. (1587) 74 Eng. Rep. 455 (C.P.).

23. TREVELYAN, *supra* note 13, at 389.

24. *Id.*

25. THE PETITION OF RIGHT (Eng. 1628), available at <http://www.constitution.org/eng/petright.htm>. Its language is flowery and obsequious, but, if you read it, you will have a better understanding of the provenance of the Declaration of Independence.

“the duty of the people not to stretch it beyond the words and intention of the king.”<sup>26</sup> Call that, perhaps, the first signing statement.<sup>27</sup> And Charles was as bad as his word. A judge released a man on a writ of habeas corpus when it appeared that the man’s only crime was insolent behavior before the Privy Council, so the man was recharged in the Court of Star Chamber<sup>28</sup>—the dreaded high court that operated in secret, without indictments, juries, or even witnesses, and without appeals. The Star Chamber was indeed a court, so the judges could do nothing about the new charge, and Parliament had nothing to say about it, because the King had taken Parliament completely out of the picture by the simple expedient of dissolving it.<sup>29</sup> In other words, there were no checks and balances.

Charles ruled for the next eleven years without Parliament and with a submissive judiciary, but of course he became increasingly unpopular. Eventually, he ran out of money and was forced to call Parliament into session. As soon as it assembled, Parliament asserted itself—by enacting the Habeas Corpus Act of 1640.<sup>30</sup> That statute essentially codified The Petition of Right, which Charles had ignored, and it abolished the Court of Star Chamber. It was the tipping point in a long confrontation between King and Parliament that culminated in the English Civil War, the rise of Oliver Cromwell, and the removal of King Charles. (He was not merely removed—he was beheaded.)

Cromwell the executive was no more supportive of habeas corpus than Charles the monarch had been. He, too, dissolved Parliament. Parliament was restored after Cromwell died, and the monarchy was restored, and Charles II became king, but this Charles, too, had his problems. The Great Plague of 1665 and the Great Fire of

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26. Proceedings against William Stroud, (1629) 3 State Trials 235, 281 (K.B.).

27. Cf. Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, available at [http://www.boston.com/news/nation/articles/2006/04/30/bush\\_challenges\\_hundreds\\_of\\_laws/](http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/).

28. See DUKER, *supra* note 18, at 46-47 (citing Chamber’s Case, (1679) 79 Eng. Rep. 717 (K.B.) (Privy Council); Chamber’s Case, (1630) 79 Eng. Rep. 746 (K.B.) (Star Chamber)).

29. See TREVELYAN, *supra* note 13, at 390.

30. 16 Car., c.10 (Eng.).



London in 1666 happened on his watch—they were the seventeenth century's version of Hurricane Katrina. Charles II made war on the Dutch and had his “mission-accomplished” moment when the English captured New Amsterdam,<sup>31</sup> but that was followed by serious setbacks, for which he made a scapegoat of his closest personal advisor, Edward Hyde, Lord Clarendon, Lord Chancellor of England. Not only did Clarendon give poor advice about the war—he was also impeached in the House of Commons, for sending “divers of his majesty's subjects to be imprisoned against [the] law, in [the] remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning any other of his majesty's subjects in like manner.”<sup>32</sup> Interestingly enough, the people he sent to be imprisoned in the remote islands were primarily the religious fundamentalists of their times: the defeated Puritans, the regicides, thought to be “at large, plotting out there.”<sup>33</sup>

Charles II was also at odds with Parliament. He dissolved it four times. The 1679 Parliament, however, managed to enact the Habeas Corpus Act of 1679, described as “probably the most famous statute in the annals of English Law.”<sup>34</sup> “Habeas Corpus Act” is not the name Parliament gave to the statute. The official name was “An Act for the better securing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas.”<sup>35</sup> This Act not only established once and for all the right of a subject to petition for habeas corpus, but it also laid out the procedure: it commanded that a return be made and the prisoner produced within three days (ten days, if the prisoner had to be transported more than twenty miles;

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31. New Amsterdam was later renamed in honor of Charles's brother, the Duke of York. See, e.g., DAVID M. ELLIS ET AL., A SHORT HISTORY OF NEW YORK STATE 28 (1957).

32. DUKER, *supra* note 18, at 53 (citing Proceedings in Parliament against Edward Earl of Clarendon, (1663-1667) 6 State Trials 291, 330).

33. *This American Life: Habeas Schmabeas* (Chicago Public Radio broadcast Mar. 10, 2006), available at [http://www.thislife.org/Radio\\_Episode.aspx?episode=310](http://www.thislife.org/Radio_Episode.aspx?episode=310).

34. See DUKER, *supra* note 18, at 52.

35. (1679) 31 Car. 2, c.2 (Eng.), available at <http://www.british-history.ac.uk/report.asp?compid=47484>.

twenty, if more than 100 miles);<sup>36</sup> a return was to “certify the true causes of [the person’s] detainer and imprisonment”; and, unless it appeared from the return that the prisoner was “detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters,” the prisoner was to be discharged—that is, set free.

## II. HABEAS CORPUS AT THE FOUNDING

That was the Great Writ. That was the fully evolved writ of habeas corpus, as it was imported, sometimes wholesale, sometimes piecemeal, into the laws of all thirteen American colonies.<sup>37</sup> Every member of the Constitutional Convention that convened in Philadelphia 110 years after the Habeas Corpus Act of 1679 knew about it.<sup>38</sup> English history was their history, after all, so they knew that the Great Writ had been forged on the anvil of struggle between King and Parliament over nearly a century.

They also knew that the writ could be, and had been, suspended. Indeed, it was only months after James II was forced into exile by the so-called Glorious Revolution of 1688, and William and Mary had been crowned upon their acceptance of an English Bill of Rights, and a century of turmoil over religion and arbitrary monarchical power had finally come to a peaceful end, that the new king suggested that habeas be suspended for three months—because “several persons about the Town, in Cabals [were conspiring] against the Government, for the interest of King James,” because some of these people had been “apprehended and secured,” because others might also be apprehended and secured, and because “[i]f these should be set at liberty, ‘tis apprehended we shall be wanting to our

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36. Cognoscenti will know that the three-day period for returning the writ has been preserved intact in the federal habeas statute, 28 U.S.C. § 2243 (1971), with an allowance of up to twenty days for good cause.

37. See DUKER, *supra* note 18, at 95-125.

38. See generally Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 337-38 (1983) (describing a published account of English jurors securing their freedom through habeas corpus that received “noteworthy attention in the American colonies”).

own safety, the Government, and People.”<sup>39</sup> Parliament agreed to one suspension, for three months, but not to another, perhaps accepting the argument of Sir Robert Napier, who said “This Mistress of ours, the *Habeas Corpus* Act, if we part with it twice, it will become quite a common Whore. Let us not remove this Landmark of the Nation, for a curse attends it.”<sup>40</sup>

The Founders also knew that the writ of habeas corpus had uses that transcended criminal law and extended to questions of public policy and even morality, as in the celebrated case of James Sommersett, who was a slave.<sup>41</sup> An Englishman named Stewart purchased Sommersett in Virginia and brought him to England. Sommersett escaped, but he did not get away. He was seized by Stewart’s agents and chained up in a ship bound for Jamaica, where Stewart, who had no use for an escape-minded slave, was going to sell him. Three English citizens submitted affidavits in support of a petition to Lord Mansfield for a writ of habeas corpus. The captain of the slave ship responded that this was a property matter—that Sommersett had not been manumitted, enfranchised, set free, or discharged. I refer you to Judge Higginbotham’s brilliant exegesis of this case<sup>42</sup> and note here only the peroration of Lord Mansfield’s judgment:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law which preserves its force long after the reason, occasion, and time itself when it was created, is erased from memory. It is so odious that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say that this case is allowed or approved by the law of England; and therefore the black must be discharged.<sup>43</sup>

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39. DUKER, *supra* note 18, at 61 (quoting 9 DEBATES OF THE HOUSE OF COMMONS 129-30 (Anchitell Grey ed., 1763)) (emphasis omitted).

40. DUKER, *supra* note 18, at 61 (quoting 9 DEBATES OF THE HOUSE OF COMMONS 263 (Anchitell Grey ed., 1763)).

41. The Case of James Sommersett, (1772) 20 State Trials 1, 79-82 (K.B.); see A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 353 (1978).

42. HIGGINBOTHAM, *supra* note 41, at 353.

43. The Case of James Sommersett, (1772) 20 State Trials 1, 82 (K.B.).

Understanding the history of habeas corpus, which by then was universally understood to be a privilege of the King's subjects and defined by common law, the Founders included this clause in Article I, Section 9 of the Constitution:

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.<sup>44</sup>

Habeas corpus was the only common law writ mentioned in the Constitution. It was also one of the first subjects to which the first Congress turned its attention, in the Judiciary Act of 1789, empowering federal courts, for the purpose of inquiring into the cause of commitment, to "issue writs of . . . habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."<sup>45</sup>

### III. JEFFERSON AND LINCOLN

There have been many notable developments in the writ of habeas corpus in this country since 1789. The nuance and filigree added by countless court decisions and law review articles is by now far beyond the ability of any ordinary person to absorb. I have time, and you will have patience, only for two historical events that show clearly how the Great Writ and the liberty interests that it represents are supported by balanced power in government and challenged when power is unbalanced and unchecked.

In 1805, Aaron Burr had completed his term as vice president in Jefferson's first term. He had killed Alexander Hamilton in a duel, he was deeply in debt, he had failed to be elected governor of New York, and he had no law practice left—so he set off on an excellent adventure involving lands in the Ohio River Valley and the Louisiana Purchase.<sup>46</sup> In late 1806 Jefferson became convinced that

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44. U.S. CONST. art. I, § 9, cl. 2.

45. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81.

46. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 352 (1996).

these adventures were in fact a treasonous conspiracy, and that Burr planned to seize New Orleans, attack Mexico, assume Montezuma's throne, add Louisiana to his empire, and then add the North American states from the Allegheny Mountains west. Jefferson sent a special message to Congress naming Burr as the "arch conspirator" and asserting that his "guilt [was] placed beyond question."<sup>47</sup> Jefferson also asserted that Erick Bollman and Samuel Swartwout were Burr's accomplices.<sup>48</sup> On orders from the president, General James Wilkinson, acting governor of the New Orleans territory, seized Bollman and Swartwout and sent them to Washington for trial. The Supreme Court of the territory issued a writ of habeas corpus. Wilkinson ignored it. Another habeas was issued by the district court in South Carolina when Bollman and Swartwout were landed at Charleston, but that one, too, was ignored. The day the two prisoners arrived in Washington, Jefferson hand-carried information about them to the U.S. Attorney and instructed the prosecutor to go to court immediately and seek a bench warrant charging them with treason.<sup>49</sup> That same afternoon, activated by Jefferson's agents, the Senate passed a bill suspending habeas corpus for three months.<sup>50</sup> George Washington had assured Jefferson that Senators, with their six-year terms of office, would be the saucer that could cool the hot tea of democracy,<sup>51</sup> but this time it was the House that controlled the situation, rejecting the habeas suspension bill by a vote of 113 to 19.<sup>52</sup> Shortly thereafter, Chief Justice Marshall issued an order for the release of Bollman and Swartwout with an opinion, one of first impression, that established the Supreme Court's power to grant relief on a writ of habeas corpus as an original action.<sup>53</sup> *Ex parte Bollman* has

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47. *Id.* at 353.

48. *Id.*

49. *Id.* at 354-55.

50. *Id.* at 355. Note the attention to precedent: it was for three months that Parliament suspended the writ at the suggestion of William and Mary in 1689.

51. See *NewsHour with Jim Lehrer* (PBS television broadcast Nov. 7, 2000) (transcript available at [http://www.pbs.org/newshour/bb/politics/july-dec00/hist\\_11-7.html](http://www.pbs.org/newshour/bb/politics/july-dec00/hist_11-7.html)).

52. SMITH, *supra* note 46, at 355.

53. *Ex parte Bollman*, 8 U.S. 75 (1807).

since been understood to hold that the Constitution not only constrains the suspension of habeas corpus, but also guarantees its continuing existence.<sup>54</sup>

The next major habeas event came sixty years later, at the start of the Civil War. I expect that almost everyone in this room is generally aware that Abraham Lincoln suspended habeas corpus. My guess is that many if not most of you also believe that it was really okay—that Lincoln could do no wrong, that he explained himself to Congress, that his acts were ratified, that history presents imperatives, et cetera, et cetera. But the more one knows about this story, the more uncomfortable one becomes with it—at least if one is a judge. Within weeks after his inauguration in March 1861, and within days after the surrender of Ft. Sumter, Lincoln became concerned that troops coming to the defense of Washington from the North might be interdicted by the destruction of railroad bridges between Philadelphia and Washington, and particularly in the vicinity of Baltimore.<sup>55</sup> On April 27, 1861, he gave an order to General Winfield Scott, the Commanding General of the Army of the United States. He wrote:

If at any point on or in the vicinity of the military line, which is now [or which shall be] used between the City of Philadelphia and the City of Washington . . . you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where resistance occurs, are authorized to suspend that writ.<sup>56</sup>

A month later, John Merryman was arrested—by military troops, not by civilian law enforcement authorities—and charged with participation in the destruction of railroad bridges after the Baltimore riots in April. His lawyers

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54. Justice Scalia, dissenting in *INS v. St. Cyr*, 533 U.S. 289, 337 (2001), does not agree: “A straightforward reading of this text discloses that [the habeas clause of the Constitution] does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.”

55. See DAVID HERBERT DONALD, *LINCOLN* 298-99 (1995).

56. Letter from Abraham Lincoln, President, United States, to Winfield Scott, Commanding General, (Apr. 27, 1861), reprinted in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865*, at 237 (1989) [hereinafter *SPEECHES AND WRITINGS*].

addressed a petition for habeas corpus to Roger Taney, who was Chief Justice of the United States but who was sitting as a circuit judge. Taney was a Marylander of the Southern persuasion who hated Lincoln. Lincoln was not very fond of Taney either. Taney had written the *Dred Scott* decision,<sup>57</sup> a disgustingly racist opinion finding among other things that the Founders considered black people "so far inferior, that they had no rights which the white man was bound to respect."<sup>58</sup> *Dred Scott* had been the centerpiece of many of Lincoln's speeches that paved his way to the presidency.<sup>59</sup> In his first inaugural address, in fact, just before Taney administered the oath of office to him, Lincoln gave advance notice that he would not let Taney's Court stand in his way. He said:

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.<sup>60</sup>

For people like me—who think Abraham Lincoln wore a halo, the country lawyer from Illinois who personified devotion to the Rule of Law—that statement is something of a head slap. And so was Lincoln's response to Taney's decision in the *Merryman* case,<sup>61</sup> which was, essentially, to ignore it.<sup>62</sup>

57. *Scott v. Sanford*, 60 U.S. 393 (1856).

58. *Id.* at 407.

59. See, e.g., Abraham Lincoln, Speech at Columbus, Ohio (Sept. 16, 1859), reprinted in *SPEECHES AND WRITINGS*, *supra* note 56, at 49-54; Abraham Lincoln, Address at Cooper Institute (Feb. 27, 1860), reprinted in *SPEECHES AND WRITINGS*, *supra* note 56, at 111.

60. Abraham Lincoln, President, United States, First Inaugural Address, (Mar. 4, 1861), reprinted in *SPEECHES AND WRITINGS*, *supra* note 52, at 221. Lincoln had been persuaded by William H. Seward to tone this down from his first draft, which said, "the people will have ceased to be their own rulers, having turned their government over to the *despotism of the few life-officers composing the Court*." DOUGLAS L. WILSON, *LINCOLN'S SWORD: THE PRESIDENCY AND THE POWER OF WORDS* 63 (2006) (emphasis added).

61. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

62. Consider, by way of contrast, the penitential response of Andrew

It must be said, in Lincoln's defense, that Taney was as confrontational with his *Merryman* decision as a judge could possibly be. Merryman was arrested on Saturday, his petition was delivered to Taney on Sunday, and Taney first demanded that a return be made on Monday. He relented and gave General Cadwalader until Tuesday, but he had already prepared his decision, and, when no return was made on Tuesday, he read it from the bench.<sup>63</sup> He found that the President did not have the power to suspend the writ, or the power to authorize any military officer to do so, and that military officers had no right to arrest anybody not subject to the Articles of War for an offense against the United States. Taney conceded in his opinion that he had no power to enforce his own order. He said he had exercised all the power the Constitution conferred upon him but that "that power has been resisted by a force too strong for me to overcome."<sup>64</sup> He directed the Clerk to transmit a copy of his order under seal to the President and said "[i]t will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."<sup>65</sup> Then, at his own expense, he had his decision printed as handbills and distributed them as widely as he could.

Lincoln's answer was not to answer, except, in a July Fourth message to a special session of Congress, to point out that the Constitution was silent as to which branch of the government had authority to suspend the writ and to assert that, in an emergency, when Congress was not in session, the President had the authority.<sup>66</sup> He went on to

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Jackson to the contempt citation of a judge whom Jackson had arrested for issuing a writ of habeas corpus at the end of the War of 1812. Cf. Caleb Crain, *Bad Precedent: Andrew Jackson's Assault on Habeas Corpus*, THE NEW YORKER, Jan. 29, 2007, at 78.

63. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 33 (1998); CARL B. SWISHER, *THE OLIVER WENDELL HOLMES DEVISE* 844-48 (1974).

64. *Ex parte Merryman*, 17 F. Cas. at 153.

65. *Id.*

66. Abraham Lincoln, President, United States, Special Message to Congress (July 4, 1861), reprinted in *SPEECHES AND WRITINGS*, *supra* note 56, at 252-53.



ask a famous rhetorical question, whether Taney meant that "all the laws, but one" could go unexecuted, and "the government itself go to pieces, lest that one be violated?"<sup>67</sup> A month later, Congress bailed Lincoln out of the serious trouble he would otherwise be in among historians—legal historians, anyway. On August 6, 1861, it enacted a statute approving, legalizing, and validating all the acts, proclamations, and orders that Lincoln had issued since his inauguration,<sup>68</sup> and in March 1863 it enacted another statute unambiguously authorizing the President to suspend habeas "during the present rebellion."<sup>69</sup>

The *Merryman* story is a necessary part of any history of habeas corpus in America, but my purpose for retelling it here is to emphasize the vulnerability of the writ when the delicate constitutional system of checks and balances is upset. There was no effective opposition to what Lincoln did. His Republican party had complete control of both houses of Congress, the Southern senators and representatives having withdrawn.<sup>70</sup> Taney's Supreme Court and all the federal courts were at the historic low point of their influence after *Dred Scott*. Indeed, as one scholar puts it, during the Civil War, "[p]etitioners applied to the President and to military leaders rather than to the courts. So great . . . was the scope of executive power, and so limited the power of the courts, that by the end of the war much of the deference ordinarily accorded to the

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67. SPEECHES AND WRITINGS, *supra* note 56, at 253.

68. Act of Aug. 6 1861, ch. 63, § 3, 12 Stat. 326. "Scholars assert there is uncertainty as to whether this August 6 Act included the suspension of habeas corpus, although there seems to be no doubt that it included the declaration of martial law." Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225, 1232 n.31 (2002) (citing PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS 225 (4th ed. 2000)); *see also*, David Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1140 (2003) (noting Maine Senator William Pitt Fessenden's assurances that the Act "avoids all questions with regard to the habeas corpus and other matters, and refers' only to the 'military appropriations' . . . ; 'there is nothing in the world in it except what relates to the Army and Navy volunteers'" (quoting 37 CONG. GLOBE, 37th Cong. 1st Sess. 442 (1861))).

69. Act of Mar. 3, 1863, 12 Stat. 755, 755.

70. Republicans held the Senate 32-16 and the House 106-70. DONALD, *supra* note 55, at 304-05.

judiciary was accorded elsewhere . . . .”<sup>71</sup> The President had a clear field on which to act, and act he did, issuing further proclamations suspending the privilege of the writ throughout the country, “authorizing the arbitrary arrest of any person ‘guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States,’”<sup>72</sup> and, in one case perhaps better remembered in my town than yours, actually dissolving the District of Columbia court that was the predecessor of my own court, because its judges had defied Lincoln’s military officers on a habeas petition.<sup>73</sup>

#### IV. HABEAS BECOMES A POST-CONVICTION REMEDY

In 1867, a new Congress dominated by northern radical Republicans rejected Andrew Johnson’s permissive policies toward the rebel states and passed Reconstruction Acts that divided the South into military districts.<sup>74</sup> This Reconstruction legislation gave a great deal of new habeas power to federal courts and judges—the power, “in addition to the authority already conferred by law,” to issue writs of habeas corpus “in all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution, or of any treaty or law of the United States . . . .”<sup>75</sup> A year later, in *Ex parte McCardle*, the Supreme Court held that the 1867 Act “[brought] within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.”<sup>76</sup> What federal judges now had was the authority to reach into state and local jails. This, too, was a power play: strong Congress, weak president,

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71. SWISHER, *supra* note 63, at 901-02.

72. DONALD, *supra* note 55, at 380.

73. See MATTHEW F. MCGUIRE, AN ANECDOTAL HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 1801-1976, at 44-46 (1977); JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE; A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 36-37 (2001).

74. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 405-08 (2001).

75. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385.

76. *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868).

defeated and compliant state governments in the rebel South.

It took the courts another fifty years, until about 1920, to begin exercising these broader powers, but, beginning around 1920, habeas began its transition into what it mostly is today—a legal tool for bringing post-conviction, collateral challenges in criminal cases. By 1945, except for the great World War II cases—*Quirin*,<sup>77</sup> *Yamashita*,<sup>78</sup> *Eisentrager*,<sup>79</sup> *Endo*<sup>80</sup>—habeas had become a vehicle for challenging convictions “on facts dehors the record”<sup>81</sup>: “mob domination of trial[s],” “knowing use of perjured testimony by [the] prosecution,” “[absence of] intelligent waiver[s] of counsel[ ],” “coerced plea[s] of guilty,” “[absence of] intelligent waiver[s] of jury trial,” and “denial[s] of right to consult with counsel.”<sup>82</sup>

After World War II, habeas continued to develop along those lines, and its development is hard to explain in terms of checks and balances. Certainly there were disturbances in the power grid during that period—Truman’s seizure of the steel mills, the Warren Court’s orders to desegregate public schools, Johnson’s war in Vietnam, Nixon’s legal problems and Clinton’s impeachment—but these disturbances created little demand for a check against unlawful or unexplained executive detention. For fifty years, habeas was largely the province of the judiciary, which, left to its own devices, both expanded its reach into state judicial proceedings and managed, as judges will, to create a frustrating procedural maze for petitioners. In recent times, instead of providing a judicial check against arbitrary and unlawful executive detention, habeas has devolved into a federal judicial check against state judicial proceedings.

By 1947, the number of habeas filings had expanded to the point where the Judicial Conference of the United States—think of it as the judiciary’s College of Cardinals—

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77. *Ex parte Quirin*, 317 U.S. 1 (1942).

78. *In re Yamashita*, 327 U.S. 1 (1946).

79. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

80. *Ex parte Endo*, 323 U.S. 283 (1944).

81. *United States v. Hayman*, 342 U.S. 205, 212 (1951) (emphasis omitted).

82. *Id.* at 212 n.12 (citations omitted).

recommended statutory changes designed to streamline procedures and reduce frivolous or repetitive prisoner filings.<sup>83</sup> One such change, a new provision on finality, now codified as 28 U.S.C. § 2244, would “exclude applications presenting no new grounds,”<sup>84</sup> and allow judges to refuse to entertain repetitive or “nuisance” habeas applications. Another was a new way for federal prisoners to bring post-trial challenges to their sentences, or to the constitutional or jurisdictional bases of their convictions. This procedure, now 28 U.S.C. § 2255, was a kind of quasi-habeas. A motion under § 2255 would be filed, not where the prisoner’s custodian was, as habeas petitions had to be, but in the court that had imposed the sentence. There was no automatic requirement for the government to make a return, and no requirement that the prisoner be produced. A § 2255 motion could be, in practice almost always was, and still is, handled entirely on paper.

Apparently nobody told the Supreme Court about this effort to shrink the habeas caseload. *Brown v. Allen*,<sup>85</sup> decided in 1953, just before Earl Warren’s arrival as Chief Justice, removed any lingering doubt that the federal courts were empowered to test the constitutionality of state court convictions. That decision was followed by landmark decisions of the Warren Court that dramatically expanded the scope of constitutional protections for criminal defendants,<sup>86</sup> and the flood gates of prisoner habeas litigation opened wide. Between the early 1950s and the late 1980s, when the “abuse” question came to a head again, the number of habeas petitions filed in federal courts grew geometrically, if not logarithmically, from fewer than 1,000 per year to more than 20,000.<sup>87</sup>

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83. See REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES OF THE UNITED STATES (1947).

84. George F. Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 418 (1953).

85. 344 U.S. 443 (1953).

86. See, e.g., *Benton v. Maryland*, 395 U.S. 284 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Massiah v. United States*, 377 U.S. 201 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

87. Compare *United States v. Hayman*, 342 U.S. 205, 212 n.13 (“By 1943,

In 1995, in order to “curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases,”<sup>88</sup> Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>89</sup> The federal courts, obsessing, as judges will do, about caseloads and statistics,<sup>90</sup> essentially asked for the AEDPA, after receiving another report from the Judicial Conference, this one chaired by Justice Louis Powell.<sup>91</sup> The AEDPA imposed a one-year period of limitation for motions filed under § 2255,<sup>92</sup> and it precluded habeas relief for any claim that had been adjudicated on the merits in state court unless the state court result was contrary to “clearly established federal law, as determined by the Supreme Court.”<sup>93</sup> In other words, lower federal courts were to be seen and not heard; we certainly were not to get all creative with the Constitution.<sup>94</sup> Since the AEDPA, writes Professor

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1944 and 1945 . . . the annual average of filings reached 845 . . .”) with ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at table C-2 (2004) (23,344 federal habeas petitions filed), and ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at table C-2 (2005) (24,633 federal habeas petitions filed).

88. H.R. REP. NO. 23, at 8 (1995).

89. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

90. Nobody has written more, or more perceptively, about the development of the judiciary into a cadre of managers, more than adjudicators, than Professor Judith Resnik of Yale. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Whither and Whether Adjudication?* 86 B.U. L. REV. 1101 (2006).

91. See H.R. REP. NO. 23, at 8; JUDICIAL CONFERENCE OF THE UNITED STATES, AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES (Lewis F. Powell, Jr., Chairman 1989). Justice Powell was not chosen at random to chair this committee. In his concurring opinion in *Schneekloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (joined by then-Associate Justice Rehnquist), he had spoken of the “unprecedented extension of habeas corpus far beyond its historic bounds and in disregard of the writ’s central purpose . . . .” The early development of what eventually became the AEDPA, and the role of judicial thinking in that development, are authoritatively spelled out in an article in this *Review*, by the University at Buffalo Law School’s present dean, R. Nils Olsen, Jr., *Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners*, 31 BUFF. L. REV. 301 (1982).

92. 28 U.S.C. § 2255(1)-(4) (2000).

93. 28 U.S.C. § 2254(d)(1) (2000).

94. In *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006), the Supreme Court

Shoenberger in a recent *Catholic University Law Review* article, “the ambit of the writ has been greatly limited—some would say to the virtual vanishing point.”<sup>95</sup>

### V. *QUO VADIS*?

So here we are, in 2007. We have no jurisdiction of habeas petitions by alien combatants or suspected ones. We have no power to hear post-conviction claims more than a year old. We are instructed not to be creative. Where are you going, habeas corpus? (That, by the way, is the meaning of “*quo vadis*.”) The answer, in my view, is nowhere—unless attention is paid to several problems.

One problem, not widely known or understood, perhaps, because habeas is now almost exclusively about collateral review of criminal convictions, and because prisoners have no political constituency, is delay. It takes far too long to move a habeas petition, or a § 2255 application, through the system. The habeas statute continues to pay lip service to the three-day return period imported directly from the 1679 English statute, but in practice habeas and § 2255 petitions linger for months, or even years. Each district judge is required to report semiannually his or her “old motions” in civil cases—those that have been pending undecided for longer than six months.<sup>96</sup> It’s a negative incentive—a shaming device—and it has been quite effective in getting judges to move their cases along. Habeas corpus cases and § 2255 applications, however, are not regarded as “motions.” They are not reportable, so, if they are sitting on remote corners of our desks gathering dust, there is no public accountability. Transparency does wonders.

Another problem that needs to be addressed is the procedural obstacles that confront prisoners seeking review on the merits of their petitions. I have done no empirical

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reinforced this directive, stressing that federal courts considering habeas petitions may declare trial court proceedings unconstitutional only if the proceedings under review ignored explicit direction from prior Supreme Court opinions concerning clearly established federal law. After the AEDPA, a finding that trial court proceedings were “so inherently prejudicial that they deprive[d] the defendant of a fair trial,” absent Supreme Court precedent directly on point, is not enough. *Musladin*, 127 S. Ct. at 651.

95. Shoenberger, *supra* note 20, at 56.

96. See Civil Justice Reform Act, 28 U.S.C. § 476(a)(1) (2000).

research on this subject, but I can tell you that virtually every habeas petition and § 2255 application on my docket has to be dismissed, or transferred to another court, before I ever get close to the merits: the application was filed too late, or it is a second or successive application, or it was filed in the wrong court, or it seeks application of a Supreme Court decision that has no retroactive application.<sup>97</sup> I think my experience is common among district judges. Most post-conviction claims do lack merit, it's true, but I suspect that we expend a lot more energy crafting careful opinions explaining why we cannot reach the merits than we would if we simply ruled on the issues that petitioners ask us to decide.<sup>98</sup>

The third problem, of course, is the jurisdiction-stripping provision of the Military Commissions Act of 2006.<sup>99</sup> I cannot comment outside my own courtroom on the constitutional validity of what Congress did last year. What I can and do say is that, when it silences the judiciary, Congress abdicates its own historic role in the system of checks and balances, and it leaves the way open to abuse of the executive's power to detain. When the House of Representatives refused to suspend the writ for Thomas Jefferson, it left John Marshall free to act. When Congress gave Lincoln *carte blanche* during the Civil War, there was no space for the courts to act. It takes all three branches to get it right; one cannot sit on the sidelines.

There is no legislative history that explains what Congress did. One Congressman, formerly chair of the House Judiciary Committee, pointed to a lawyer who talked about making trouble for the government,<sup>100</sup> and it may be

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97. At common law, the refusal of one court to discharge a prisoner was no bar to the filing of second and successive applications to others courts, and indeed an important part of the history of the writ was its employment by courts to exercise their own jurisdiction and fend off encroachments by other courts. See *DUKER*, *supra* note 18, at 28-41.

98. For an exhaustive commentary on the ramifications of habeas corpus procedure, see Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).

99. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7 (a), 120 Stat. 2600, 2635 (2006).

100. 152 CONG. REC. H7522, H7547 (daily ed. Sept. 27, 2006) (statement of Rep. Sensenbrenner). To demonstrate the alleged obstructionism of lawyers at Guantánamo, the Congressman quoted Michael Ratner, of the Center for Constitutional Rights, this way: "The litigation is brutal [for the United

that Congress was stampeded into thinking that unscrupulous lawyers and activist judges would just gum things up at Guantánamo. If that is what Congress thought, it had faulty intelligence.

The accumulated record demonstrates only professionalism on the part of lawyers and moderation and restraint from the bench. I canvassed my colleagues on their handling of the Guantánamo detainee cases and confirmed my understanding that no judge has ordered the release of any petitioner, and no judge has ordered a change in the conditions of confinement or the treatment of any Guantánamo detainee. One judge did order, early on, that the government permit access by attorneys to their detainee clients,<sup>101</sup> but the government neither seriously resisted nor appealed that order, and thereafter lawyers were routinely permitted access. The government did resist giving counsel access to the medical records of one detainee who had been force-fed, but it acquiesced in the judge's remedial order.<sup>102</sup> My court agreed, for our own efficiencies and to make life easier for government counsel, that a single judge would deal with administrative matters, such as the appointment of counsel and the treatment of classified documents.<sup>103</sup> Many of us did require the government to prepare and file factual returns—but, of course, that's how habeas corpus works, and we waited much longer for returns than the twenty days the habeas statute allows.

I do not say that the involvement of lawyers and judges made it easy for the government at Guantánamo, but nothing about the justice system we boast about—not habeas corpus, grand juries, public trials, the presumption of innocence, the right to counsel, the confrontation clause, the privilege against self-incrimination, unanimous

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States] . . . [y]ou can't run an interrogation . . . with attorneys." Michael Ratner, Letter to the Editor, *WALL ST. J.*, Mar. 14, 2007, at A13 (quoting "an article by Onnesha Roychoudhuri in a March 2005 piece for Mother Jones"). What Mr. Ratner actually said was, "Every time an attorney goes down there, it makes it much harder for the U.S. military to do what they are doing. You can't run an *interrogation and torture camp* with attorneys." *Id.* (emphasis added).

101. See *In re Guantánamo Bay Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (setting forth procedures for counsel access to detainees).

102. See *Majid Abdulla Al-Joudi v. Bush*, 406 F. Supp. 2d 13 (D.D.C. 2005).

103. See, e.g., *In re Guantánamo Bay Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).



verdicts—nothing about our system is designed to make it easy or comfortable for the government to lock people up indefinitely without charges.

The extraterritorial reach of habeas corpus presents a difficult set of issues, to be sure. The great World War II decisions established that the writ “acts upon” the custodian, not the prisoner,<sup>104</sup> but just who the custodian is, and where the custodian may be sued, and what rights a petitioner has if the custodian fails to return just cause for detention, remain unclear.<sup>105</sup> Not only are these difficult issues, but no answer fits every case. Nobody would grant a writ of habeas corpus to a combatant on the battlefield, but should the United States government not be required to show cause why it detains a Canadian citizen somewhere in Poland? Dealing with questions like that, case by case, is quintessentially the role of judges, as Anthony Lewis wrote in a recent column: “Judges are not always wise. But in our system they are the ones we trust to weigh acutely conflicting interests.”<sup>106</sup> Judges cannot play that role if they have no jurisdiction, however. Nor, as I hope I have shown here, can Congress’s own force vector be effective in our tripartite system of government if the judiciary is rendered impotent. It is worth remembering what Chief Justice Marshall wrote, 200 years ago in the *Bollman* case, about “positive law,”<sup>107</sup> by which he meant, not judge-made, common law, but law enacted by the legislature: statutory law. Congress can indeed remove our jurisdiction, but Congress can also establish it, and clarify it.

Congress may soon consider legislation that would “restore” habeas to where it was before the enactment of the Military Commissions Act.<sup>108</sup> My suggestion—my wish—is

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104. See, e.g., *Ex parte Endo*, 323 U.S. 283, 304-05 (1944).

105. Compare the majority, concurring, and dissenting opinions in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

106. Anthony Lewis, *Not all Sources are Equal*, N.Y. TIMES, Mar. 7, 2007, at A21.

107. *Ex parte Bollman*, 8 U.S. 75, 125-37 (1807). See also the later observation of Justice Miller in *In re Neagle*, 135 U.S. 1, 78 (1889), that the habeas authority of federal courts comes *only* from the habeas statute, or “positive law.”

108. See, e.g., Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong. (2007); Restoring the Constitution Act of 2007, S. 576, H.R. 1415, 110th Cong. (2007).

that Congress do more than that. We seem to be, right now, at one of those moments in history when the vectors of power are changing. At such moments, as I think I have shown, the writ of habeas corpus has been vulnerable, or it has been ascendant. Now is a time when Congress should not only *restore* full habeas corpus jurisdiction to the federal courts, but also *revisit* the history and the fundamental purposes of the Great Writ, and *repair* it. In particular, I suggest that Congress address and consider removing or reducing the procedural barriers that so often frustrate merits review of habeas and § 2255 petitions; insist on the prompt, timely handling of habeas and § 2255 petitions, perhaps by enacting public reporting requirements; and, most importantly, proclaim that the federal writ of habeas corpus shall run to any place in the world where people may be detained or otherwise deprived of their freedom by officers or agents of the American government—so that American justice may be, and may be seen to be, present wherever in the world America shows her flag, projects her power and influence, and trumpets her values of liberty and freedom.

