

April 29, 2025

MEMORANDUM

FOR: SUSIE WILES
CHIEF OF STAFF

FROM: WILLIAM SCHARF
ASSISTANT TO THE PRESIDENT AND STAFF SECRETARY

SUBJECT: THE WRIT OF HABEAS CORPUS

The Writ of Habeas Corpus is a legal mechanism to challenge unjust confinement, detention, or punishment. Filing a habeas corpus action allows an individual to present legal arguments as to why they should be released from custody.

The history of habeas corpus dates back to the very dawn of English common law. Denial of habeas corpus rights was a key grievance underlying the American Revolution, and the right to apply to the federal courts for habeas review dates to the beginning of the Republic. It prevents, in effect, governmental actors from detaining, imprisoning, or executing individuals arbitrarily.

Article I, Section 9 of the Constitution provides that habeas corpus can only be suspended in times of rebellion or invasion, and the courts have almost uniformly held that suspension of habeas corpus rights requires Congressional action.

Even where Congress has explicitly suspended habeas corpus rights, the Supreme Court has held that some alternative process must be provided to defendants, with procedural safeguards akin to a habeas corpus action. This caselaw greatly diminishes the utility of suspensions of the writ to the executive branch in all relevant contexts. And such alternative processes have almost never been allowed in circumstances where the courts are open and available, the sole exception being the trial in the United States by military tribunal of captured German saboteurs during World War II.

Throughout American history, all three branches of the federal government have been loathe to interfere with habeas corpus rights, doing so only in the direst of circumstances, and typically with respect to very limited categories of individuals.

The only President to suspend habeas corpus without any underlying Congressional action, or to defy the courts with respect to habeas corpus matters, was President Lincoln in a brief window at the start of the Civil War. And after the *Ex Parte Merryman* case held his actions to be illegal, Lincoln in fact sought and received Congressional authorization for suspending habeas corpus.

I. Early History

The Writ of Habeas Corpus, often referred to historically as “the Great Writ,” is a legal mechanism to challenge unjust confinement or detention. While use of the writ of habeas corpus to challenge detention did not become commonplace until the 1600s, the first issuance of a writ of habeas corpus was in 1305 during the reign of Edward I, and its procedural roots predate Magna Carta of 1215.

The availability of this mechanism to challenge the legality of a person’s confinement became a motivating issue during the American Revolution and during the drafting of the Constitution, as a reaction against the perceived and actual abuses of British colonial authorities.

The United States Constitution provides that “[t]he 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.” This clause (commonly known as the “Suspension Clause”) appears in Article I, Section 9, which sets out limits on legislative power, creating the inference that Congress, not the President acting alone, has the power to suspend habeas corpus.

The Judiciary Act of 1789, the first act of Congress structuring the federal court system, included the power of issuing writs of habeas corpus, and Supreme Court caselaw on the subject dates back to *Ex Parte Bollman* in 1807. From that time, habeas relief has generally been available to all prisoners or detainees—both citizens and non-citizens—on American soil to challenge the legality of their confinement or punishment, with very few historical exceptions.

II. The Civil War

A. *Ex Parte Merryman*

At the outset of the Civil War in April 1861, pro-secessionists in Baltimore, Maryland attacked federal troops transiting through that state on their way to defend Washington, D.C. President Lincoln authorized the U.S. Army to detain individuals interfering with their operations in Maryland, and suspended the writ of habeas corpus to facilitate such detentions (i.e., detainees could be held without ever seeing a judge and without any court considering a challenge to their detention).

One such individual detained by the U.S. Army was John Merryman, a Maryland resident who was alleged to have helped destroy crucial bridges needed by the Army. Merryman’s lawyers challenged his detention and asked Supreme Court Chief Justice Taney to issue a writ of habeas corpus. In *Ex Parte Merryman*, Taney¹ held that the President lacks the power to suspend the

¹ During this time period, in addition to their service on the Supreme Court, justices would typically also “ride circuit,” hearing cases as lower court judges. Here, Taney was acting in this capacity as a circuit court judge in Maryland, as opposed to in his capacity as Chief Justice.

writ of habeas corpus—that only Congress has the power to do so pursuant to the Suspension Clause—and ordered the Army (and Lincoln) to produce Merryman.

Lincoln refused to obey Taney's order. Merryman remained in military custody, and many others accused of treason were held in military custody without legal recourse.

However, to resolve this conflict with the courts, Lincoln requested that Congress take action, which it did, authorizing in a series of duly enacted laws Lincoln's suspension of habeas corpus, culminating in the Habeas Corpus Suspension Act of 1863. This Act provided that Lincoln could suspend habeas corpus rights so long as the Civil War was ongoing, with certain safeguards against arbitrary detention and imprisonment.

B. Ex Parte Milligan

Lincoln proceeded to suspend the writ of habeas corpus throughout the Union in any case involving traitors, spies, and prisoners of war. In 1864, Lambden Milligan was arrested for conspiring with others to steal weapons and raid a Union prisoner-of-war camp. Milligan was tried before a military commission and sentenced to death by hanging for treason.

Milligan's attorneys challenged his trial and punishment by seeking a writ of habeas corpus in federal court, and the case reached the Supreme Court as *Ex Parte Milligan* in 1866. The Court held that Milligan's trial by military commission had been unlawful, because "martial rule can never exist when the [civilian] courts are open," as had been the case in Indiana at the time of Milligan's arrest. Essentially, if the civilian courts are open in a given jurisdiction, the government cannot simply circumvent them by suspending habeas rights for the sake of convenience or expedition.

III. Reconstruction

In 1871, the Ku Klux Klan had emerged as an existential threat to the reestablishment of federal authority in the South and made the enforcement of the post-Civil War constitutional amendments all but impossible. In response, Congress passed the Enforcement Act of 1871, commonly referred to as the Ku Klux Klan Act. Among many other provisions, the Act authorized the suspension of the writ of habeas corpus to deal with the threat of the Klan.

Although President Ulysses S. Grant waged a low-grade war against the Klan throughout the South, successfully crushing what is generally known as the First Klan, he only suspended habeas corpus rights once, and only after this prior Congressional authorization. In the fall of

1871, pursuant to the Ku Klux Klan Act, Grant declared martial law and suspended habeas corpus in nine hill counties of South Carolina, where the Klan was particularly intractable.

IV. World War II

Habeas corpus rights were tested in two important contexts during World War II.

A. Hawaii

First, at the outset of hostilities with Japan, the Governor of Hawaii, then a territory, declared martial law and suspended habeas corpus, acting pursuant to the Hawaiian Organic Act. In 1946, the Supreme Court decided *Duncan v. Kahanamoku*, a challenge by a civilian against his arrest and conviction by a military tribunal. The Court ruled that the suspension of habeas rights and the trial were improper, because civilian courts in Hawaii were operating at the time of his conviction.

B. German saboteurs

Second, and more important, was the case of the trial of German saboteurs by military commission, which reached the Supreme Court as *Ex Parte Quirin*. In December 1941, eight German agents, including two U.S. citizens, were carried by U-boat across the Atlantic and landed on Long Island in New York and on Ponte Vedra Beach in Florida. Two turned themselves in to the FBI. The remainder were captured.

President Roosevelt, acting by executive order, established a military tribunal to prosecute the eight. All were convicted and sentenced to death, although President Roosevelt commuted the sentences of the two who had surrendered, leaving the other six to be executed.

The Supreme Court reviewed the constitutionality of the military tribunal, and held that it was allowable because of the specific nature of the defendants and the crimes alleged. Because they were unlawful enemy combatants in a time of war, they were subject to the jurisdiction and judgment of military tribunals, and even for the American citizens in the group the writ of habeas corpus was unavailable. The Supreme Court rested its opinion in part on the fact that, through its declaration of war, Congress had authorized the application of the laws of war to enemy combatants, effectively suspending any habeas rights for this class of individuals that would otherwise have existed.

V. Global War on Terror

After the invasion of Afghanistan in October 2001, the United States began holding detainees at Camp X-Ray, Naval Station Guantanamo Bay. In 2002, some of these detainees began filing

habeas corpus petitions in the federal courts, challenging their detention and eventually the military commission process that was set up to try them.

In 2004, the Supreme Court issued its decision in one of these cases, *Rasul v. Bush*. In *Rasul*, the Court held that federal courts had jurisdiction to hear habeas petitions from non-citizen prisoners held at Camp X-Ray, and that habeas jurisdiction extended to all dominions under the sovereign control of the United States.

On the same day, the Court also issued its decision in *Hamdi v. Rumsfeld*. Yaser Hamdi was an American citizen by birth who had been captured in Afghanistan and transferred to Camp X-Ray. The Court was split badly on *Hamdi*, issuing four opinions, none of which are controlling. But one thing a 6-3 majority did agree on is that U.S. citizens cannot be detained without due process protections like habeas rights.

In response to these decisions and a number of others, Congress passed the Detainee Treatment Act of 2005, and the Military Commissions Act of 2006. These statutes established a system of military tribunals and commissions to try detainees, and explicitly suspended the availability of habeas corpus for detainees.

However, in 2007, the Supreme Court held in *Boumediene v. Bush* that the military tribunal system then operating was unconstitutional, because the procedures being followed were not adequate substitutes for habeas corpus rights. The Court held that the enemy combatants at Camp X-Ray had the right to either habeas review of their detentions, or an adequate and equivalent substitute.

In response to *Boumediene*, in 2009 Congress passed and President Obama signed the Military Commissions Act of 2009, which established new military commissions with procedural rights and safeguards more akin to traditional legal proceedings, aimed at satisfying the Court's standard.

The upshot of these cases is that for all persons held in de facto U.S. territory habeas rights apply, or in the limited circumstance of military detainees an adequate alternative to habeas must be provided.