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Federal Courts

AVAILABILITY OF HABEAS CORPUS RELIEF FOR MILITARY DETAINEES

Introduction

The right to petition for a writ of habeas corpus is rooted in tradition, guaranteed by the Constitution, and defined by Congress. The writ provides a check against unreasonable detention by the Executive, both in the civilian and military arena. Despite the limited power of Congress to suspend habeas corpus during times of national emergency, it remains an effective tool in restraining the power of the chief executive and the military courts. Recent actions by Congress have presented new challenges to the right to habeas review of military and civilian judicial proceedings, but the judiciary has continued its efforts to protect the right of the individual against unreasonable detention, both at home and abroad.

The Federal Habeas Corpus Statute

28 U.S.C. § 2241 contains the basic authorization for federal judges to grant writs of habeas corpus.[1] It grants habeas corpus jurisdiction to "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[2] The statute, which until recently was written broadly enough for the Court to hold that a petition that does not arise from within any federal court district could still be heard under the proper circumstances,[3] has undergone extensive amendment in recent years.[4] Section 2241 was amended in 2006 specifically to deny habeas corpus jurisdiction to

[1] Donald l. Doernberg, C. Keith Wingate & Donald H. Zeigler, *Federal Courts, Federalism and Separation of Powers* 1003 (3d ed., West 2000) [hereinafter Doernberg, *Federal Courts*].
[2] 28 U.S.C. § 2241(a) (2006).
[3] See *Rasul v. Bush*, 542 U.S. 466 (2004).
[4] See Pub. L. No. 104-132, 110 Stat. 1214.

aliens detained as enemy combatants by the Department of Defense at Guantanamo Bay, Cuba.[5] Sections 2242 and 2243 provide for the application, return, and hearing of a habeas petition, while § 2244 places limitations on successive petitions.[6] Sections 2245-2252 provide procedural guidelines for habeas proceedings, § 2253 governs appeals, and § 2254 contains most of the current restrictions on habeas relief for state prisoners.[7] Sections 2261-2266 provide expedited procedures governing capital cases and limit the grounds for relief that the federal courts may consider.[8]

Early History

Habeas Corpus in England

The right to petition for a writ of habeas corpus dates back at least to the signing of the Magna Carta in 1215, which reads: "No free man shall be taken, imprisoned, [deprived of property], outlawed, banished, or in any way destroyed,…except by the lawful judgment of his peers and by the law of the land."[9] Although the Magna Carta was originally intended as a contract between the king and the aristocracy, this clause was later construed as a guarantee that no English subject would be imprisoned by the Crown unless he was presented with charges against him and given the opportunity to seek relief from a judge on the King's Bench.[10] In 1679, in response to Charles I's attempts to deprive his subjects of the right to habeas relief, Parliament enacted the

[5] 28 U.S.C.A. § 2241(e) (2006).
[6] Doernberg, *Federal Courts* 1003.
[7] *Id*. at 1004.
[8] *Id*. at 1005.
[9] Christopher A. Christman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & Politics 31, 35 (2005).
[10] *Id*.

Habeas Corpus Act, codifying the common law writ of habeas corpus,[11] which, according to Blackstone, had existed since the time of the Norman invasion.[12] The Act required the King's officers and jailers to produce to the courts any person charged with a crime, upon petition by the prisoner.[13] Failure to produce the prisoner within the specified time would result in fines on the jailer and the potential release of the prisoner.[14] Failure of the King or his agents to produce evidence of the accused's crime would also result in the release of the prisoner.[15] The Act did permit habeas corpus to be suspended in the event of a national emergency, but it granted Parliament, not the King, the exclusive authority to determine whether such a suspension was justified.[16]

Habeas Corpus in the United States

The framers of the Constitution incorporated the right to petition for writ of habeas corpus into Article I, Section 9.[17] The language recognizes the existence of the writ, and forbids the government from suspending it, "unless when in cases of Rebellion or Invasion the public Safety may require it," but does not expressly state whether the power to suspend the writ is vested in the executive or the legislature.[18] Justice Story described the writ as "the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement…"[19] Story, along with

[11] *Id*. at 36.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*. at 39.
[18] *Id*.
[19] *Id*. at 41.

other early commentators, believed that Congress held exclusive power to suspend the writ, and that its decision to do so was not subject to judicial review.[20]

The Supreme Court addressed the issue of federal habeas powers in *Ex parte Bollman*, 8 U.S. 75 (1807).[21] Chief Justice Marshall held that the common law described the "meaning" of habeas corpus, but did not vest the federal courts with the inherent authority to issue a writ, holding that "the power to award the writ by any of the courts of the United States, must be given by written law."[22] However, the Court also held that the Constitution requires Congress to provide the courts with that power unless it intends to suspend the writ pursuant to Article I, Section 9.[23] The Judiciary Act of 1789 provided federal judges, as well as the justices of the Supreme Court, with the power to issue writs of habeas corpus.[24]

Jurisdiction and Oversight of Military Courts

Judicial oversight of the military dates back at least to the fourteenth century, when the Crown established the Court of Constable and Marshal, whose authority extended over knights and soldiers involved in foreign wars.[25] By the seventeenth century, this authority was given to the newly formed courts martial.[26] The courts martial were governed by the Articles of War, issued by the Crown, and the Mutiny Acts, which came from Parliament.[27] These laws gave the courts martial the authority to adjudicate

[20] *Id*. at 42.
[21] *Id*. at 43.
[22] *Id*.
[23] *Id*. at 43-44.
[24] *Id*. at 43.
[25] James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 508 (2006).
[26] *Id*. at 508.
[27] *Id*. at 508-09.

and punish members of the military at home and abroad.[28] The courts martial were not courts of record, and had no fixed location; they were convened on the order of the commanding officer as temporary tribunals to hear cases of wrongdoing within the military organization, which carried out any ordered punishment.[29] However, these military courts remained subject to the oversight of the civilian government, which regulated the courts' jurisdiction.[30] Also, because the military generally lacked the power to adjudicate cases over civilians, the courts martial often lacked jurisdiction to adjudicate events taking place overseas.[31]

A series of overseas tort cases established the jurisdiction of the English civilian courts, using English common and statutory law, to challenge the legality of overseas military detentions.[32] In one of these cases, *Mostyn v. Fabrigas*, the King's Bench affirmed a judgment in favor of a native Minorcan whom the military governor had banished from the island.[33] The court traced its authority to the fact that a military governor, like any other member of the military, traced his own authority to the Crown, so it made sense that his actions would be subject to the Crown's courts, whether those actions took place at home or overseas.[34] *Mostyn* and other decisions held that a presumption in favor of controlling English law existed in overseas tort cases, which could be overcome only by showing that another court had jurisdiction; if this could not be shown, then adjudication by the civilian courts was viewed as essential to the proper

[28] *Id*. at 508-509.
[29] *Id*. at 508-09.
[30] *Id*. at 509-10.
[31] *Id*.
[32] *Id*. at 509-10.
[33] *Id*. at 509-10.
[34] *Id*. at 511.

administration of justice.[35] Although the Crown's courts refused to hear the claims of enemy aliens during wartime, this rule was not applied to aliens under other circumstances; the courts would hear the overseas claims of both British subjects and foreign citizens who sought damages for unlawful deprivation of liberty or property.[36]

The United States adopted similar principles upon independence in a series of decisions which held that courts martial lacked jurisdiction to punish individuals that were not properly subject to military discipline.[37] The Supreme Court held that members of the court martial could be sued for damages as trespassers for exceeding the bounds of their authority,[38] and added that both citizens and aliens could seek relief for wrongful military detention through petition for a writ of habeas corpus.[39]

World War II Habeas Cases

Prior to World War II, instances of overseas detention were quite limited[40]. After the war's end, former officers and soldiers of Japan and Germany who had been convicted of war crimes by Allied military tribunals filed petitions with the Supreme Court, challenging the legality of the tribunals[41]. The Court denied the majority of these petitions on the ground that it lacked original jurisdiction[42]. However, this bar to jurisdiction could be avoided by initiating the action in federal district court, as long as any statutory restrictions on the district court's jurisdiction could be overcome, or at least

[35] *Id*.
[36] *Id*. at 511-12.
[37] *Id*. at 515-16.
[38] *Id*. at 515, citing *Wise v. Withers*, 7 U.S.(3 Cranch) 331, 337 (1806).
[39] Pfander, 91 Cornell L. Rev. at 515-16.
[40] *Id*. at 516.
[41] *Id*. at 516-17.
[42] *Id*. at 517.

challenged on appeal[43]. Three pivotal cases were heard by the Supreme Court, which defined the right to habeas relief for military detainees captured during the war, as well as those facing deportation or imprisonment after hostilities ended.

Quirin v. Cox

The petitioners, all but one of whom claimed German citizenship, had first resided in the United States, returned to Germany between 1933 and 1941, where the German government trained them in the use of explosives and secret writing.[44] They returned to the United States via German submarine, intending to commit acts of sabotage against American war industries and war facilities, as directed by the German government.[45] The men were apprehended before committing any acts of sabotage, and were brought before a Military Commission, pursuant to a Presidential Order issued after the declaration of war.[46] The Commission found them guilty of Violation of the Laws of War; the prisoners responded with a petition for a writ of habeas corpus in federal district court.[47] The district court denied the petition; before a decision by the Court of Appeals could be made, the Supreme Court granted certiorari.[48]

The Court held that the Constitution endows Congress with the power to provide for the common defense, and that the President has the duty to "take care that the Laws be faithfully executed," designating him as the Commander in Chief of the Army and Navy.[49] Because Congress provided rules for the Army which allowed for the trial and

[43] *Id*. at 517.
[44] *Quirin v. Cox*, 317 U.S. 1, 20-21 (1942).
[45] *Id*. at 21.
[46] *Id*. at 22-23.
[47] *Id*. at 22-23.
[48] *Id*. at 19-20.
[49] *Id*. at 26, citing Art. I, § 8, & Art. II, §§ 2, 3.

punishment of violations of the Articles of War, the Court held that the President was duly empowered to authorize the trial and punishment, through military commissions and courts martial, of "those charged with relieving, harboring, or corresponding with the enemy and those charged with spying."[50] The Court, citing "universal agreement and practice," reasoned that the law of war distinguishes between lawful combatants, who are entitled to capture and detention as prisoners of war, and unlawful combatants, who are additionally subject to trial and punishment by military tribunals "for acts which render their belligerency unlawful."[51] Citing applications of military adjudication from the Revolutionary War, the Mexican War, and the Civil War,[52] the Court held that the Military Commission had acted within its jurisdiction.[53] The Court also noted that United States citizenship would not relieve an enemy belligerent of the consequences of his actions.[54] Thus, United States citizens accused of war crimes could be declared enemy belligerents, and would therefore fall within the jurisdiction of the military courts.[55] The Court concluded that the President was lawfully authorized to try the petitioners in a military tribunal as enemy belligerents, that the tribunal was lawfully constituted, and that the petitioners were in lawful custody. Citing those reasons, the court denied their petition for writ of habeas corpus.[56]

[50] *Quirin* at 27.
[51] *Id*. at 31.
[52] *Id*. at 27-35.
[53] *Id*. at 36-38.
[54] *Id*. at 37-38.
[55] *Id*. at 37-38
[56] *Id*. at 48.

Ahrens v. Clark

On July 14, 1945, removal orders were issued for 120 German nationals, stating that each of them were dangerous to the public peace and safety of the United States.[57] The Germans, who were detained on Ellis Island for eventual deportation, filed petitions for writ of habeas corpus in District Court for the District of Columbia, on the principal ground that the removal orders exceeded the statutory authority on which they were issued after hostilities with Germany had ended.[58] The petitioners named the Attorney General of the United States as respondent, alleging that their confinement on Ellis Island subjected them to his "custody and control."[59] The Attorney General moved for dismissal of the petition on the ground that the petitioners were outside the confines of the District of Columbia, and therefore the district court lacked jurisdiction.[60] The district court denied the petition, and its denial was affirmed on direct appeal.[61] On certiorari, the Supreme Court held that "apart from specific exceptions created by Congress, the jurisdiction of the district courts is territorial," adding that "it is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction."[62] The Court reasoned that Congress had confined the habeas powers to a court's territorial jurisdiction to avoid the logistical and jurisdictional problems that would be created by ordering the transfer of a prisoner to a distant forum, and added that if district courts are to be given the discretion to hear such cases, it would be up to Congress to grant them that power.[63] The Court concluded that the district court's lack of jurisdiction precluded

[57] *Ahrens v. Clark*, 335 U.S. 188, 189 (1948).
[58] *Id*. at 189.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 190, citing *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 467, 468 (1945).
[63] *Ahrens* at 191-93.

any discussion of "what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights."[64]

Johnson v. Eisentrager

After the surrender of Germany, but prior to the Japanese surrender, twenty-one German nationals were captured in China.[65] Their illegal activities consisted mainly of gathering information concerning American troops and their movements and providing that information to the Japanese.[66] The U.S. Army took the men into its custody after the Japanese surrender.[67] The men were tried and convicted by a U.S. Military commission in Nanking for engaging in, permitting, or ordering continued military activity against the United States after the German surrender; after their conviction and military review of their sentences, they were repatriated to Germany to serve their sentences.[68]

The prisoners petitioned for a writ of habeas corpus in the District Court for the District of Columbia, alleging that their imprisonment violated the Constitution and the laws of the United States, as well as provisions of the Geneva Convention governing prisoners of war.[69] The district court dismissed their petition, citing *Ahrens v. Clark*.[70] The Court of Appeals reversed, reinstating the petition and remanding the case for further proceedings.[71] The Court of Appeals held that any person, including an enemy alien, deprived of his liberty anywhere under the purported authority of the United States is entitled to the writ if he can show that he is being held in violation of the U.S.

[64] *Id*. at 193.
[65] *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950).
[66] *Id*. at 766.
[67] *Id*.
[68] *Id*.
[69] *Id*. at 765-66.
[70] *Eisentrager* at 767, *Ahrens*, 335 U.S. 188.
[71] *Id*. at 767; See also 174 F.2d 961.

Constitution, and that when deprivation of liberty occurs outside the territorial jurisdiction of any district court, the petition will lie in the district court which has territorial jurisdiction over the officials who have directive power over the immediate jailer.[72]

The Supreme Court granted certiorari,[73] and reversed the order of the Court of Appeals.[74] Writing for the majority, Justice Jackson explained:

> We are cited to no instance where a court in this or any other court where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the Constitution extends such a right, nor does anything in our statutes.[75]

Although "modern American law has come a long way" from the time when all enemy nationals were classified as outlaws, the Court stated that the law continues to distinguish between citizens and aliens, aliens of friendly and hostile allegiance, and resident and nonresident enemy aliens.[76] Noting that the United States accords a "generous and ascending scale of rights" to an alien in proportion to his allegiance to our government,[77] the Court added that the security and protection that the law normally provides is "greatly impaired when his nation takes up arms against us."[78]

The Court, citing *Ludecke v. Watkins*,[79] held that:

> [T]he resident enemy alien is constitutionally subject to summary arrest, internment, and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the

[72] *Id*. at 767, citing 174 F.2d 961.
[73] *Id*. at 767.
[74] *Id*. at 791.
[75] *Id*. at 768.
[76] *Id*. at 769.
[77] *Id*. at 770.
[78] *Id*. at 772.
[79] 335 U.S. 160 (1881).

> Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.[80]

The Court explained further that this policy is justified by the need to "prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy," and that "the rule of common law and the law of nations" is that "alien enemies resident in the country of the enemy could not maintain an action in its courts during the period of hostilities."[81]

After establishing that the rights of a resident enemy alien were drastically curtailed during wartime, the Court reasoned that a nonresident enemy alien who is captured and imprisoned abroad has even fewer rights under the law.[82] The Court explained that when an enemy alien who has never resided in the United States is captured outside the United States, is tried and convicted by a Military Commission sitting outside the United States for violation of the laws of war committed outside the United States, and is then imprisoned outside the United States, that person has no basis for the privilege of litigation in the federal courts,[83] and to allow such a person to petition for a writ of habeas corpus "would hamper the war effort and bring aid and comfort to the enemy" by diverting the "efforts and attention" of a military field commander "from the military offensive abroad to the legal defensive at home."[84] The Court added that the likely result of granting such a writ would be an unnecessary conflict between the judiciary and the military, adding further that we could not expect any reciprocity for our

[80] *Eisentrager* at 776, citing 335 U.S. 160.
[81] *Id*. at 776.
[82] *Id*. at 777.
[83] *Id*. at 777-78.
[84] *Id*. at 779.

own troops, because the writ of habeas corpus is "generally unknown" outside the English-speaking world.[85]

The Court held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States," noting that "the jurisdiction of military authorities, during or after hostilities, to punish those guilty of offenses against the laws of war is long-established."[86] Citing *In re Yamashita*,[87] the Court observed that "[i]f the military tribunals have lawful authority to hear, decide, and condemn," then correction of their errors of decision is a matter for the military authorities, "which are alone authorized to review their decisions" and that the Court's role is limited to consideration of "the lawful power of the commission to try the petitioner for the offense charged."[88] Because the Court was unable to find any lack of jurisdiction in the military commission's authority to try, convict, and imprison the petitioners, the Court reversed the Court of Appeals, affirming the district court's original denial of the petition.[89]

Enemy Combatants and the War on Terrorism

Prior to 2001, the United States treated acts of terrorism primarily as a criminal law concern.[90] The FBI investigated the crimes and pursued the suspects; when apprehended, the defendants were tried pursuant to U.S. criminal law.[91]After the attacks

[85] *Id*. at 779.
[86] *Id*. at 785.
[87] 327 U.S. 1 (1946).
[88] *Eisentrager* at 787, citing 327 U.S. 1, 8.
[89] *Id*. at 790.
[90] Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 Ariz. St. L.J. 939 (2003).
[91] Swanson, 35 Ariz. St. L.J. at 939.

on the Pentagon and the World Trade Center on September 11, 2001, Congress responded by enacting the Authorization for Use of Military Force (AUMF).[92] The AUMF, approved seven days after the attacks, authorizes the President "to use all necessary and appropriate force…against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons," in order to "prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[93] The broad language of the AUMF gives the President as much authority to prosecute the war against these entities as other presidents have had to prosecute past wars,[94] including implicit authority to detain enemy combatants until the end of hostilities, even if they are U.S. citizens.[95] Although the precedents established by the World War II habeas cases have made judicial review of military detentions difficult, several post-2001 habeas cases have been reviewed by the Supreme Court. These cases, *Rasul v. Bush*,[96] *Hamdi v. Rumsfeld*,[97] and *Rumsfeld v. Padilla*,[98] provide important guidance in understanding the current status of the law regarding judicial review of military detentions.

Rasul v. Bush

The petitioners were two Australian citizens and twelve Kuwaiti citizens who were captured in Afghanistan during hostilities between the United States and the

[92] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2048 (2005).
[93] Bradley & Goldsmith, 118 Harvard L. Rev. 2047, 2077.
[94] *Id*. at 2078-79.
[95] *Id*. at 2053.
[96] 542 U.S. 466 (2004).
[97] 542 U.S. 507 (2004).
[98] 542 U.S. 426 (2004).

Taliban, and have been held at the U.S. Naval Base at Guantanamo Bay Cuba ("Guantanamo") since early 2002.[99] The United States occupies Guantanamo pursuant to a 1903 lease agreement, executed in the aftermath of the Spanish-American War, which states that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba [over the area]," and that "the Republic of Cuba consents that during the period of occupation by the United States…the United States shall exercise complete jurisdiction and control over and within said areas."[100] In 1935, the parties entered into a treaty providing that the lease would remain in effect as long as the United States did not abandon the site.[101] The relief the petitioners sought included release from custody, access to legal counsel, access to the federal courts or some other impartial tribunal, and notice of any charges against them.[102]

The Government, citing *Eisentrager*,[103] argued that the federal courts lack authority to issue a writ of habeas corpus because, like the petitioners in *Eisentrager*, the Guantanamo detainees are enemy aliens who have never resided in the United States, were captured outside the United States, and have at all times been imprisoned outside the United States.[104] However, the petitioners argued that they differ from the *Eisentrager* detainees in several important respects: they are not nationals of countries at war with the United States, they deny that they have planned or participated in any acts of aggression against the United States, they have never been afforded access to any sort of

[99] *Rasul* at 470-71.
[100] *Id*. at 470-71.
[101] *Id*. at 471.
[102] *Id*. at 472.
[103] 339 U.S. 763.
[104] *Rasul* at 475-76.

tribunal, and they have been imprisoned for an extended period in territory over which the United States exercises exclusive jurisdiction and control.[105]

The Court, citing *Braden v. 30th Judicial Circuit Court of Ky.*,[106] noted that a prisoner's presence within the territorial jurisdiction of the district court is not a prerequisite for habeas jurisdiction under the federal statute.[107] The Court explained that because the writ "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts within its statutory jurisdiction as long as "the custodian can be reached by service of process."[108] The Court reasoned that because *Braden* established that *Ahrens* no longer establishes an "inflexible jurisdictional rule," it is relevant "only to the question of the appropriate forum, and not to whether the claim can be heard at all."[109]

The Court also held that any arguments that the federal habeas statute cannot be applied to extraterritorial claims are not relevant to claims alleging unlawful imprisonment at Guantanamo because "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."[110] The Court also noted that the Government concedes that the habeas statute would create federal court jurisdiction over an American citizen held at the base, and that the statute draws no distinction [at the time of the holding][111] between Americans and aliens held in federal custody.[112] The Court reasoned that "[a]pplication of the habeas statute to persons detained at the base is consistent with

[105] *Id*. at 476.
[106] 410 U.S. 484 (1973).
[107] *Rasul* at 478, citing *Braden* at 494-95.
[108] *Rasul* at 478, citing *Braden* at 494-95.
[109] *Rasul* at 479.
[110] *Id*. at 480.
[111] See 28 U.S.C. § 2241(e) (2006).
[112] *Rasul* at 481.

the historical reach of habeas corpus," citing Lord Mansfield's holding that even if a territory was "no part of the realm," there was "no doubt" as to the Court's power to issue a writ of habeas corpus if the territory was "under the subjection of the Crown."[113] In conclusion, the Court held that because the petitioners contended that they are being held in violation of the laws of the United States, have been in detention for more than two years without any hearing or access to counsel, and because no party questions the District Court's jurisdiction over the prisoners' custodians, the federal habeas statute "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."[114]

Hamdi v. Rumsfeld

Yaser Hamdi is a U.S. citizen, born in Louisiana in 1980.[115] His family moved to Saudi Arabia during his childhood; by 2001, he was residing in Afghanistan.[116] While in Afghanistan, he was captured by members of the Northern Alliance and subsequently turned over to U.S. military custody.[117] After initial detention and interrogation, Hamdi was transferred to the Guantanamo Bay Naval Base, where his U.S. citizenship was discovered.[118] The government then transferred him to a naval brig in South Carolina where they continued to detain him as an enemy combatant.[119] The government argues

[113] *Rasul* at 481-82, citing *King v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759).
[114] *Rasul* at 483-84.
[115] *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).
[116] *Id*. at 510.
[117] *Id*.
[118] *Id*.
[119] *Id*.

that his enemy combatant status allows the military to detain him indefinitely without formal proceedings or access to counsel.[120]

In June 2002, Esam Hamdi, Yaser's father, filed a petition for writ of habeas corpus in the Eastern District of Virginia, naming his son and himself (as next friend) as the petitioners.[121] The petition alleges that Esam Hamdi has had no contact with his son since the Government took him into custody, and that his son has been held without access to counsel and without notice of the charges against him.[122] The petition argued that as an American citizen held within the territory of the United States, Yaser Hamdi is entitled to the full protection of the Constitution, but he is being held in violation of the Fifth and Fourteenth Amendments.[123] The habeas corpus petition asked the court to appoint counsel, order the respondents to cease interrogating him, declare that he is being held in violation of the Fifth and Fourteenth Amendments, schedule an evidentiary hearing to allow the petitioners to present proof of their allegations, or in the alternative, to order that Yaser Hamdi be released from his "unlawful custody."[124]

The district court ordered that Hamdi be given access to counsel, but the Court of Appeals for the Fourth Circuit reversed the order, holding that the district court failed to give appropriate deference to the Government's security and intelligence interests.[125] On remand, the Government produced an expert witness who declared that Hamdi was "affiliated with a Taliban military unit and had received weapons training," stating

[120] *Id*. at 510-11.
[121] *Id*. at 511.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 512.

further that Hamdi had remained with his Taliban unit following the September 11 attacks, and was armed at the time his unit surrendered to the Northern Alliance.[126]

On remand, the district court found that the testimony (called the "Mobbs Declaration") fell "far short" of supporting Hamdi's detention, and ordered the Government to turn over numerous documents and lists of witnesses and interrogators for *in camera* review. The Fourth Circuit reversed the production order on appeal, concluding that an evidentiary hearing was neither necessary nor proper, adding that the district court's inquiries "went far beyond the acceptable scope of review."[127] The Fourth Circuit also rejected Hamdi's argument that his detention was unlawful, citing the AUMF as just authorization.[128] Citing *Ex parte Quirin*,[129] the court held that anyone "who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such."[130]

The Court did not address the issue of whether the President had plenary authority to detain Hamdi, because it agreed with the Government's position that the detention was authorized by passage of the AUMF.[131] The Court reasoned that because the AUMF authorizes the President to use "all necessary and appropriate force" against the parties involved in the September 11 attacks, and that these parties included individuals assisting the Taliban in their armed opposition to the U.S. forces in Afghanistan, Hamdi's detention as an enemy combatant was justified.[132] In contrast, both petitioners and respondents agreed that the writ of habeas corpus should be made available to every

[126] *Id*. at 512-13.
[127] *Id*. at 514-15.
[128] *Id*. at 515.
[129] 317 U.S. 1.
[130] *Hamdi* at 516.
[131] *Id*. at 516-17.
[132] *Id*. at 518.

individual detained within the United States, and all agreed that Hamdi had been provided an appearance before an Article III court to challenge the legality of his detention, pursuant to 28 U.S.C. § 2241; the source of the disagreement between the parties was what process was due. [133]

The Court concluded that neither the Government's nor the district court's alternatives struck the proper balance between the rights of the citizen and the interests of national security.[134] The Court held instead that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker,"[135] but explained that the exigencies of the circumstances may demand that special rules, such as the admission of hearsay and a presumption in favor of the government's evidence may be required to avoid placing an unreasonable burden on the Executive.[136]

Conclusion

The right to petition for a writ of habeas corpus is one of our oldest and most fundamental rights. The Constitution limits the circumstances under which the right may be suspended, but lesser restrictions, such as limits on jurisdiction, are not as difficult, as is evidenced by the denial of federal habeas jurisdiction to foreign military detainees held in Guantanamo Bay, Cuba. However, American citizens held in military detention do retain their right to federal habeas review, and both American citizens and foreign

[133] *Id*. at 525.
[134] *Id*. at 532.
[135] *Id*. at 533.
[136] *Id*. at 534.

nationals are provided the right to habeas relief when they are held within the United States and its sovereign territories. Although the military courts are empowered to function separately from the civilian courts, this independence is not absolute; the tradition of judicial oversight of courts martial predates the U.S. Constitution. Although the judiciary has shown great deference to the findings of military proceedings, it will not hesitate to intervene when the proceedings themselves violate the Constitution.