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From the Magna Carta to the MCA: The Development of the Right to Habeas Corpus for Enemy Combatants of the United States

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FROM THE MAGNA CARTA TO THE MCA:

THE DEVELOPMENT OF THE RIGHT TO HABEAS CORPUS FOR ENEMY COMBATANTS OF THE UNITED STATES

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Abstract: The Writ of Habeas Corpus is one of the foremost rights entrenched in the Common Law System. However, the courts' varying interpretations of the "Suspension Clause" of the American Constitution have resulted in a varied protection of this right in cases where claimants are found to be enemy combatants to the United States. To begin, this article will detail the history of the writ of habeas corpus. Then, it will offer a reflection on the instances where the Supreme Court has considered the government's proper use of the Suspension Clause, first in the Civil War and next in World War II. Finally, this article will analyze the Supreme Court's decisions in three landmark post-9/11 cases, *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004), and *Boumediene v. Bush* (2008), assessing how the court balanced competing standards set forth during the Civil War and World War II.

Introduction

In *Federalist 84*, Alexander Hamilton asserts that "the establishment of the writ of habeas corpus, the prohibition of ex post facto laws…are perhaps greater securities to liberty and republicanism than any [Constitution] contains."[2] Habeas corpus, Latin for "that you have the body," one of the most important rights granted to Americans under the Constitution, allows for a detainee to appeal to the courts that their imprisonment is unlawful. This provision protects against improper government interference into the lives of individuals, and grants individuals the right to check government power through the judicial system.[3] In this way, the right of habeas corpus prevents individuals from serving unlawful jailtime. Article I, Section 9, Clause 2 of the U.S. Constitution asserts, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

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[2] Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers* (Redditch, UK: Read Books Ltd, 2018).

[3] Jonathan Kim, "Habeas Corpus," *Legal Information Institute*, June 2017, https://www.law.cornell.edu/wex/habeas_corpus.

Invasion the public Safety may require it."[4] This instance is the only time where the U.S. Constitution explicitly mentions "the Writ of Habeas Corpus." It is paired with the so-called "Suspension Clause," which provides for certain instances in which this right can be suspended, those being "in Cases of Rebellion or Invasion." The rationale behind the Suspension Clause is that the government's role to protect "public safety" outweighs the individual's claim for false imprisonment in times when national security is threatened. However, the Constitution provides no further explanation of what the Writ of Habeas Corpus entails or who is authorized by the Suspension Clause.

Questions concerning the right to habeas corpus have plagued American politics throughout its 245-year history, with tensions most often arising during times of war. The most prominent instances of the Suspension Clause's use include the Civil War, World War II, and most recently September 11th and the "War on Terror." Through the exploration of cases which address the rights of enemy combatants of the United States during times of war, one can achieve a full understanding of the Supreme Courts shifting jurisprudence. Throughout its history, the Supreme Court has, at times, supported the rights of enemy combatants to habeas corpus in the name of individual liberties. However, in other instances like World War II, the right has been abridged. Thus, the Supreme Court's shifting interpretations have led to a murky understanding of U.S. domestic courts' jurisdiction to hear habeas corpus claims from enemy combatants. To understand the scope and complexity of this legal clause, it is important to start at the beginning, with the first instance of the Writ of Habeas Corpus in Common Law.

Historical Analysis of Habeas Corpus Claims by Enemy Combatants of the United States

The Magna Carta, penned in 1215, was Europe's first constitution and the first legal document to establish the rights of those subject to the King of England. Clause 39 of the Magna Carta formalized the Writ of Habeas Corpus as it asserts that: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or

[4] U.S. Const. art. I, § 9 cl. 2

deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."[5]

Here, the precedent for the Writ of Habeas Corpus in the United States Constitution can be found, as the U.S. adopted the British Common Law system. Directly following the ratification of the U.S. Constitution, the First Congress passed the Judiciary Act of 1789, which granted Federal Courts the "power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment."[6] In 1830, Chief Justice John Marshall delivered the majority opinion in *Ex parte Tobias Watkins* in which the court held that the term habeas corpus "is used in the Constitution, as one which was well understood [...] for the purpose of inquiring into the cause of commitment."[7] Thus, the court held that habeas corpus must be understood in the context of the time in which it was established. Here, the understanding of habeas corpus as a "well understood" right, suggests that the right is known and possessed by all. The insinuation of universal possession supports claims that the right may not be denied to enemy combatants. This position would prove to have long-lasting effects regarding the proper suspension of the right.

The writ of habeas corpus and the Suspension Clause appear in Article I, Section 9 of the U.S. Constitution. Section 9 of the Constitution sets forth the powers denied to Congress. In addition, the right to habeas corpus differs from the explicit rights granted in the Bill of Rights, as its only mention is in the extreme conditions when the right may be legally abridged. Understanding habeas corpus as an assumed right lends credence to those who reject the government's ability to deny habeas corpus to enemy combatants, as a universally granted right may not be exclusionary. Though the Suspension Clause does not explicitly declare who holds the power to suspend the writ of habeas corpus, its location within the Constitution has led the majority of scholars to hold it as a power granted to Congress, not the Executive.[8] Until very late in the Constitutional Congress, the Suspension Clause was located within Article 3, which would have made it a power of the judiciary. On September

[5] "British Library Treasures in Full: Magna Carta - English Translation," *Magna Carta*, last updated September 2007, https://www.bl.uk/treasuresmagnacarta/translation/mc_trans.html.
[6] U.S. Congress, *An Act to Establish the Judicial Courts of the United States*, 1st Cong., 1st session, *Congressional Record* 11, Group 1, 82 § 14 https://www.loc.gov/law/help/statutes-at-large/1st-congress/session-1/c1s1ch20.pdf.
[7] *Ex Parte Tobias Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830).
[8] Amy Barrett and Neal Katyal, "Interpretation: The Suspension Clause," The National Constitution Center, accessed April 15, 2021, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/763.

12, 1789, just five days before the final draft of the Constitution was signed, the Suspension Clause was moved to Article I.[9] In this way, the Suspension Clause was made a power of the Legislature.

Abraham Lincoln challenged the scope of the Suspension Clause at the outset of the Civil War. On April 27, 1861, less than two weeks after the South's secession, President Lincoln sent an executive order to General Winfield Scott in which he asserted: "You are engaged in suppressing an insurrection against the laws of the United States. If at any point […] 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."[10] With this sweeping authorization, General Scott and his army responded to the rumors that General Robert E. Lee would soon be invading Maryland. In order to suppress this potential threat, Union forces began to arrest prominent Baltimore County elites, one of whom was plantation owner John Merryman.

Soon after his arrest, Merryman was imprisoned at Fort McHenry. He then sent word to his lawyers, who petitioned for the writ of habeas corpus to the U.S. Circuit Court for Baltimore on the grounds that he was arrested without a warrant and denied due process. Merryman was issued the writ, and the court called General Cadwalader to explain Merryman's arrest. Cadwalader denied the court's request, asserting that President Lincoln granted him the authority to arrest Merryman when he suspended the writ of habeas corpus. Chief Justice Rodger Taney, who also served on the U.S. Circuit Court, held that President Lincoln had no authority under the Constitution to suspend habeas corpus, citing both the clause's location within Article I and the writ's historical origin as rationale. Taney asserted that if Lincoln had the right to suspend habeas corpus, then the Constitution "conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown."[11] Thus, as is revealed by Taney's opinion, the

[9] Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, or the United States Constitution and the War on Terror*, 74 Fordham L. Rev. 1475 (2005). , Available at: https://ir.lawnet.fordham.edu/flr/vol74/iss3/11

[10] "Order from President Abraham Lincoln to General Winfield Scott Suspending the Writ of Habeas Corpus, April 27, 1861," U.S. Capitol Visitor Center, accessed April 16, 2021, https://www.visitthecapitol.gov/exhibitions/artifact/order-president-abraham-lincoln-general-winfield-scott-suspending-writ-habeas.

[11] Bruce Ragsdale, "Ex Parte Merryman and Debates on Civil Liberties During the Civil War," Federal Judicial Center, 2007: 4, https://www.fjc.gov/history/cases/famous-federal-trials/ex-parte-merryman-habeas-corpus-during-civil-war.

powers under the Suspension Clause must be granted to Congress in order to safeguard individual liberties.

Despite Taney's opinion, Lincoln largely ignored the Court's ruling and continued to arrest individuals suspected of joining the insurrection or those who criticized his practice. One journalist, Frank Key Howard, the grandson of "the Star-Spangled Banner" writer Francis Scott Key, was imprisoned at Fort McHenry for fourteen months for criticizing Lincoln's behavior.[12] As is evident during times of war when national security becomes the most important issue for the nation, the expansion of the Executive's power, though at times met with pushback, is largely accepted as necessity. Consequently, the rights of individuals are abridged at times in order to guarantee liberty and justice for all.

At the height of the Civil War, on March 3, 1863, Congress passed *An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases*, which formally enacted the Suspension Clause, asserting that President Lincoln "whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case in the United States, or any part thereof."[13] Despite the Act, there was still substantial discord between Lincoln and Congress at this time, as Lincoln held that he did not need Congressional authorization to suspend the writ. Scholars such as George Sellery of the University of Wisconsin have attempted to capture the motives behind Congress' actions in passing the bill. Sellery explained in his 1907 dissertation that, in drafting the bill, Congressmen were determined not to comment on the illegality of Lincoln's previous suspension. As a result, Sellery asserts that Congress' "phraseology is not accidental […] The long acquiescence of Congress in the President's suspension of the privilege of the writ coupled with its formal enactment in the Habeas Corpus Act that the President is authorized to suspend were, in truth, recognition by Congress of the President's right to suspend."[14] Here, Sellery suggests that Congress' authorization of the suspension of habeas corpus, though a legal necessity under the Constitution, was a "recognition" of the right of the

[12] Frank Key Howard, *Fourteen Months in American Bastiles*, 3rd ed. (Baltimore, MD: Kelly, Hedian & Piet, 1863), 7.
[13] Abraham Lincoln, *An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases. By the President of the United States - A Proclamation*. General Orders. No. 315, September 17, 1863 (Washington: War Department, Adjutant General's Office, 1863)
[14] George Clarke Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress* (Chicago, IL: University of Chicago, 1907), 264-265.

President "to suspend." Though current scholars tend to believe that the President has no authority under the Suspension Act, it is helpful to recognize this pattern of Congressional "acquiescence" to the Executive concerning the suspension of the writ of habeas corpus. A similar relationship between the Executive and the Legislature has appeared during other times of national security crises such as the passing of *Authorization for the Use of Military Force* in 2001 and *the Military Commissions Act of 2006*, both of which were a direct result of the 9/11 terrorist attacks.

After the Habeas Corpus Act of 1863 was made law, questions concerning the procedural nature of the Suspension Clause died down. Even so, more issues arose surrounding the writ of habeas corpus during the Civil War, most notably in the case of *Ex parte Milligan* (1866). In October of 1864, Lambdin Milligan of Indiana was arrested and tried by a military court for conspiracy against the government, aiding the rebels, inciting insurrection, disloyal practices, and violating the laws of war. He was arrested after the government learned of a plot that he and his co-conspirators devised to free Confederate POWs from a Union arsenal. Though Milligan had never served in the U.S. Armed Forces and the Indiana judicial courts were operational, a military tribunal found him guilty and sentenced him to death.[15] Milligan and his co-conspirators petitioned for habeas corpus, and on April 3, 1866 the Supreme Court issued a ruling in favor of Milligan.

The courts' opinion, written by Justice Davis, holds that the Constitution is the law for both the rulers and the citizens of the United States in times of war and in times of peace. Davis asserts that the laws of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Moreover, though the Constitution allows for the suspension of habeas corpus, "it does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law."[16] At the time, the court's ruling in *Milligan* was seen by some Republicans as having the potential to undermine Reconstruction efforts in the South.[17] Since then, however, it has been championed by civil liberty advocates such

[15] Bruce Ragsdale, "Ex Parte Merryman and Debates on Civil Liberties During the Civil War," 19.
[16] John P. Frank, "Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii," *Columbia Law Review* 44, no. 5, (September 1944): 639, https://doi.org/10.2307/1117929.
[17] Peter J. Barry, "Ex Parte Milligan: History and Historians," *Indiana Magazine of History* 109, no. 4 (2013): 355–79, https://doi.org/10.5378/indimagahist.109.4.0355.

as John P. Frank as "a bulwark for the protection of the civil liberties of every American citizen."[18] In the face of potential backlash during times of war, the Supreme Court defended the rights of American citizens to a fair trial. Thus, the *Milligan* ruling would prove to have the most long-lasting effects on the relationship between the judicial process and American citizens found to be enemy combatants.

The Supreme Court's decision in *Ex parte Milligan* came into question during World War II in the case of *Ex parte Quirin*. In *Quirin,* eight German saboteurs, all of whom had previously spent time in the United States, and one of whom was a naturalized American citizen, were arrested after landing on the U.S. mainland in U-boats with Nazi uniforms, explosives, and cash.[19] The saboteurs later revealed that the German government was compensating them in exchange for their services, which designated them as unlawful enemy combatants in the eyes of the government. After the arrest of Quirin and his co-conspirators, President Roosevelt issued Proclamation 2561 on July 2, 1942, entitled, "Denying Certain Enemies Access to the Courts of the United States" in which he asserted:

> Whereas, the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the Law of War; […] and to the jurisdiction of military tribunals.[20]

As a result of this proclamation, the German saboteurs were tried by military tribunal and appointed Colonel Kenneth Royall as their defense attorney. Royall sent a writ of habeas corpus to the Supreme Court "to test the constitutionality and validity of the President's Order and the President's Proclamation," and on July 27, 1942 the Supreme Court agreed to hear the case.[21] Their decision to was met with mixed feelings from the media. Some outlets denounced the court for getting involved in the war, while others such as *The New York Times* and *The Washington Post* praised the court for its defense of the Constitution.[22] While

[18] Frank, "Ex Parte Milligan v. The Five Companies," 639.
[19] Andrew Kent, "Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case," *SSRN Electronic Journal*, 2012: 161, https://doi.org/10.2139/ssrn.2189037.
[20] Brad Luebbert, "The Laws Will Fall Silent : Ex Parte Quirin, a Troubling Precedent for Military Commissions." (University of Louisville, 2010): 42, https://doi.org/10.18297/etd/864.
[21] Leubbert, 53.
[22] Michal R. Belknap, "Alarm Bells from the Past: The Troubling History of American Military Commissions," *Journal of Supreme Court History* 28, no. 3 (2003): 300–322, https://doi.org/10.1111/1540-5818.00068.

it is clear that the tides of war brought forth with them a patriotic fever that accepted the President's authority to safeguard national security, there was still substantial opposition to potential government infringement on civil liberties.

The question before the court was how to balance national security interests during a time of war with the right to due process guaranteed by the Constitution. Professor Andrew Kent of Fordham University explained in a 2013 Vanderbilt Law Review article that the "Defense counsel framed the court access issue as an unconstitutional attempt by the President to suspend habeas corpus in an area where no martial law could prevail because it was far from the front lines."[23] In response to this argument, the government's prosecution contended that military tribunals were authorized for "enemy belligerents," and that the Constitution granted these saboteurs no rights. The Court sided with the government's prosecution, allowing for the military tribunal, and outlined its reasoning in a full opinion delivered three months after its *per curium* opinion. It explained that *Quirin* differed from *Milligan* because while Milligan did conspire for the Confederacy, he was not "a part of or associated with the armed forces" of the Confederacy, so he was "a non-belligerent, [and thus] not subject to the laws of war."[24] In addition, the Court held that despite one defendant's status as a naturalized American citizen:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.[25]

Here, the Court rejected citizenship status as a grounds for excusing "the consequences of a belligerency." In this way, the Court in *Quirin* more fully delineated between the rights granted to citizens and those deemed enemy combatants.

The rights granted to enemy combatants under the U.S. Constitution was further defined in another World War II case brought to the Supreme Court, *Johnson v. Eisentrager* (1950). In this case, twenty-one German soldiers who were captured by U.S. forces in China after

[23] Kent, "Judicial Review for Enemy Fighters," 165.
[24] Anthony F Renzo, "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals," *American Constitution Society for Law and Policy*, February 2008, 16.
[25] *Ex Parte Quirin,* 317 U.S. 1, 38 (1942).

the German High Command's unconditional surrender on May 8, 1945, petitioned the District Court of the District of Columbia for the writs of habeas corpus.[26] Their petition asserted that they had been denied the rights granted to them under the Fifth Amendment, Article I and III of the Constitution, and the Geneva Convention. The U.S. government's response asserted that non-resident enemy aliens during times of war do not have the right to access the U.S. courts, and that the *Quirin* ruling denied enemy aliens the writ of habeas corpus. In a 6-3 decision, the Supreme Court denied Eisentrager et al. their petition. The Court held that because the petitioners were held and tried in an Allied prison, the case was outside the jurisdiction of the United States, so the petitioners did not possess any constitutional rights to habeas corpus.[27]

Writing for the majority, Justice Robert Jackson asserted that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[28] Moreover, the Court clarified the provisions granted to resident aliens, making clear that "in extending constitutional protections beyond the citizenry, […] it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." In *Johnson v. Eisentrager*, the Court more fully defined the constitutional rights of enemy aliens, ruling that the jurisdiction of the Court and the alien's residency status determine their eligibility for the writ of *habeas corpus.* Evidently, this ruling seems to contend with *Quirin*, in which the Court denied the writ of *habeas corpus* to Germans detained on U.S. soil, one of whom, Hans Haupt, was a naturalized American citizen.

The distinction between the rights of citizens, enemy combatants, and citizen enemy combatants is complex and constantly disputed. The jurisprudence of the Court regarding these rights has shifted throughout American history. At some points in the case of *Milligan*, for example, due process has been secured in the face of pressing national security matters, while at other times like in *Quirin*, national security has taken precedence over individual rights. In his dissent in *Hamdi v. Rumsfeld* (2004), Justice Antonin Scalia explained that the

[26] *Johnson v. Eisentrager*, 339 U.S. 763, 765-766 (1950).
[27] Dawinder S. Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo*, 20 Wm. & Mary Bill Rts. J. 39 (2011), https://scholarship.law.wm.edu/wmborj/vol20/iss1/347
[28] *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950).

Court's lack of attention to the unique case of Herbert Hans Haupt, the American citizen-turned German saboteur, "was not this Court's finest hour."[29] In this way, the specific nature of the different national security threats that the nation faces has a large effect on how the courts rule in cases of habeas corpus petitions from enemy combatants. During the Civil War, the judiciary was more sympathetic towards petitioners like Merryman and Milligan; however, when faced with as large of a threat to national security as World War II, the courts tended to abridge the rights of enemy combatants in favor of executive power. Justice Jackson asserted in *Eisentrager* that "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."[30] This opinion which Justice Jackson accurately captured regarding the necessity of an energetic Executive who has "power over enemy aliens" during times of war became nearly unilateral following the national tragedy on September 11, 2001.

The War on Terror and Modern Habeas Corpus Claims

At approximately 8:46 AM on September 11, 2001, the first plane, American Airlines flight 11, hit the North Tower of the World Trade Center. Shortly thereafter, a second plane hit the South Tower and a third was crashed into the Pentagon in Arlington, VA. The news of the hijacking sent shockwaves throughout the country, as the security of American life and travel was stripped away. Responses from the Bush Administration and Congress were prompt. Bush asserted in his address to the nation on the night of the tragedy, "These acts shatter steel, but they cannot dent the steel of American resolve."[31] A week later on September 18, 2001, Congress passed the "Authorization for the Use of Military Force" (AUMF) with only one congresswoman voting nay to the joint resolution, which reads:

> The President is authorized 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

[29] Scalia, *Hamdi v. Rumsfeld* (Scalia, J., dissenting), 542 U.S. 507 (U.S. Supreme Court 2004).
[30] "Johnson v. Eisentrager, 339 U.S. 763 (1950)." (774)
[31] George Bush, "Statement by the President in Address to the Nation," The White House, September 11, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html.

> of international terrorism against the United States by such nations, organizations or persons.[32]

As a result of the AUMF, the War on Terror began, and with it came unprecedented power for the Executive to "use all necessary and appropriate force" against anyone deemed to have a connection with the September 11th attacks. As expected, in times of national security crisis, the legislature tends to grant the Executive the necessary powers to protect the nation, though sometimes at the cost of individual liberties.

The sole congresswoman who voted against the AUMF, Barbara Lee, expressed her apprehensions during debate on the House Floor, warning that the unilateral powers granted to President Bush would result in an unnecessary and prolonged war mimicking Lindon B. Johnson's involvement in Vietnam. As a result, Lee instructed "[a]s a member of the clergy so eloquently said, 'As we act, let us not become the evil that we deplore.'"[33] In this example, Lee's comments somewhat foreshadow the events that would come in the wake of 9/11. The United States engaged itself in a long-drawn-out war, with no clear enemy or end in sight. Moreover, highly dubious activities took place involving the treatment of detainees targeted by the AUMF, most often occurring at the Guantanamo Bay Detention Facility.

The Bush Administration's practices at Guantanamo, such as depriving prisoners the ability to appeal their cases to the judiciary and isolating prisoners in solitary confinement, reveals how the posture of the United States changed rapidly following 9/11. Permitted by the precedent of *Quirin,* the Bush Administration operated military tribunals in Guantanamo independent from the judicial branch and detained about 640 individuals following the military invasion of Afghanistan. The Bush Administration also believed the detainees to be unlawful enemy combatants, which would exempt their sentencing from the Geneva Convention's prohibition of indefinite sentences.[34] Moreover, the government held that because the Guantanamo Bay Prison Facility was located on a naval base within the sovereign territory of Cuba, they would apply the precedent set by *Johnson v. Eisentrager*

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[32] U.S. Congress, Senate, *Authorization for the Use of Military Force,* S.J. Res. 23. 107th Cong., 1st sess., Senate Introduced September 18, 2001, https://www.govinfo.gov/content/pkg/BILLS-107sjres23enr/pdf/BILLS-107sjres23enr.pdf

[33] Mike Ryan, "Rep. Barbara Lee's Speech Opposing the Post 9-11 Use of Force Act," *Nuclear Age Peace Foundation* (blog), September 14, 2001, https://www.wagingpeace.org/rep-barbara-lees-speech-opposing-the-post-9-11-use-of-force-act/.

[34] Michael C. Dorf, "The Detention and Trial of Enemy Combatants: A Drama in Three Branches," *Political Science Quarterly* 122, no. 1 (2007): 47–58, 49, https://www.jstor.org/stable/20202808.

that enemy aliens detained outside U.S. soil do not have access to the judicial system.[35] Nevertheless, the rights of detained enemy combatants came into question multiple times during the height of the Bush Administration's War on Terror.

The case which first considered the rights of those detained at Guantanamo Bay was *Rasul v. Bush* (2004). In *Rasul*, fourteen Kuwaitis and Australians were captured in Afghanistan and sent to Guantanamo without a hearing or any charges filed against them. They petitioned for a writ of habeas corpus, once again leading the Supreme Court to decide whether Federal Courts had the jurisdiction to review petitions of habeas corpus from detainees at Guantanamo Bay.[36] Diverging from its previous ruling in *Eisentrager*, the Supreme Court held in *Rasul* that federal courts did have proper jurisdiction over the Guantanamo Bay. The Court reached this conclusion after framing the jurisdictional question as "whether the habeas statute [28 U.S.C.§ 2241] confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[37] In answering this question in the affirmative, the Court provided the following rationale of the differences between *Eisentrager* and *Rasul* in order to extend the jurisdiction of federal courts:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[38]

As a result of the differences between *Rasul* and *Eisentrager*, the legality of detention at Guantanamo Bay began to erode. The Court's peculiar interpretation of the differences between the two cases rests on the petitioners not being "nationals of countries at war with the United States." Here, the Court seems to make a false equivalency between World War II, when the U.S. was engaged with enemy states, and the War on Terror, when the President

[35] Ryan McKaig, "Aid and Comfort: Rasul v. Bush and the Separation of Powers Doctrine in Wartime," *Campbell Law Review* 28, no. 1 (2005): 123, 125-127.
[36] Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo*, 49.
[37] Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, or the United States Constitution and the War on Terror,* 1505
[38] Stevens, *Rasul v. Bush* (Opinion of the Court), 542 U.S. 466 (2004).

was authorized under the AUMF to engage in conflict against those connected with 9/11. The AUMF did not, however, authorize the President to use force against a specific nation, only terrorist groups. As a result, the nationalities of the petitioners in *Rasul* should not have carried as much weight because despite their nationalities, they still may have been involved with terrorist organizations. In the end, though, the Court held that enemy combatants detained at Guantanamo Bay retained the right to petition the federal courts for a writ of habeas corpus.

On the same day that the Supreme Court issued its ruling in *Rasul v. Bush*, it also issued a ruling on *Hamdi v. Rumsfeld* (2004). The case involved Yaser Esam Hamdi, who was detained in Afghanistan by an American ally, the Northern Alliance, then handed over to Americans and held at Guantanamo Bay after being designated an enemy combatant. Born in Louisiana, Hamdi was a citizen of the United States under the 14th Amendment; however, due to his status as an enemy combatant, he was denied council, not given a formal charge, and held indefinitely.[39] The U.S. government contended that despite his citizenship, he could still be detained according to his status as an enemy combatant due to the precedent set in *Ex parte Quirin.* Justice Sandra Day O'Connor delivered the opinion of the Court, conceding on two points to the government. First, she acknowledged that the Constitution did not bar citizens from being held in military detention. Second, she held that the AUMF allowed for the detention of enemy combatants.[40] Nonetheless, Justice O'Connor condemned the behavior of the Bush Administration, asserting that "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[41] In this way, although the Supreme Court allowed the government to hold U.S. citizens deemed enemy combatants in military custody, they did so under scrutiny of the judiciary.

In an effort to balance the right to due process of American citizens with national security interests, the Court set forth a balancing test using the same procedure as outlined in *Mathew v. Eldridge* (1976). As a result, American citizens deemed enemy combatants would be granted the right to council and must "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a

[39] Luebbert, "The Laws Will Fall Silent," 106.
[40] Dorf, "The Detention and Trial of Enemy Combatants," 51.
[41] O'Connor, *Hamdi v. Rumsfeld* (Opinion of O'Connor, J.), 542 U.S. 507 (2004).

neutral decisionmaker."[42] Overall, the Court in *Hamdi* attempted to balance national security with individual rights. Its effort to not infringe upon the power of the Executive resulted in a stern denouncement and an acknowledgment of the legality of the government to hold American citizens in military detention. Despite the court being handcuffed by the precedent set in *Quirin*, it was still able to protect U.S. citizens' rights more adequately than before, as it limited the unchecked power of the Executive. Thus, while civil liberties in *Hamdi* were not protected much past providing a test for the judiciary to deem the legality of an abridgment of due process, this was an important step in checking the Executive's power during national security crises.

In contrast with their initial stance of allowing for Executive energy during times of threats to national security, the Supreme Court delivered a series of substantial blows to Executive power following the *Rasul* and *Hamdi* rulings. In *Hamdan v. Rumsfeld* (2006), the Supreme Court held that the AUMF and the more recent Detainee Treatment Act of 2005 did not give the President the authority to establish military commissions to try detainees and that military commissions could not be used under any circumstances without congressional approval.[43] In addition, the Court asserted that "whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in violation of […] Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear."[44] As a result, the Court narrowed the scope of *Ex Post Quirin* and *Johnson v. Eisentrager,* upon which the Bush Administration had relied for precedent in previous cases like *Rasul* and *Hamdi*. Instead, as Michael Dorf of Cornell University explained, "the *Hamdan* Court asserted the primacy of what it deemed 'the seminal case of *Ex parte Milligan.*'"[45] Consequently, the federal government's power was substantially curbed because of *Hamdan* and, in an effort to restore this power, Congress passed the *Military Commissions Act of 2006* (MCA). Thus, the Supreme Court's judgment in *Hamdan* can be seen as a departure from its previous holding in relation to enemy combatants' rights, as it seemed to ignore the precedents it had

[42] O'Connor, 542 U.S.
[43] Michael C Dorf, "The Orwellian Military Commissions Act of 2006," n.d., 10. (11)
[44] "Hamdan v. Rumsfeld - Brief (Merits)," October 21, 2014, https://www.justice.gov/osg/brief/hamdan-v-rumsfeld-brief-merits.
[45] Dorf, Michael C., "The Orwellian Military Commissions Act of 2006" (2007). *Cornell Law Faculty Publications*. Paper 55, 11. http://scholarship.law.cornell.edu/facpub/55

previously cited and reverted back to the Court's rationale from the 19th century Civil War cases.

On October 17, 2006, President Bush signed the MCA into law following a 65-34 vote in the Senate.[46] As a result of the MCA, Congress formally granted the President the power to "establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require."[47] Moreover, Section 7 of the MCA, entitled "Habeas corpus matters" reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[48]

In restricting the ability of the judiciary to fulfill their role of considering petitions for writs of habeas corpus as designated under the Judiciary Act of 1789, the MCA abridges the rights of those designated enemy combatants. Moreover, as Dorf explains, under the MCA "the President could make his own determination that a permanent resident alien is an unlawful enemy combatant, order that permanent resident alien detained and tortured within the United States, and no court would have jurisdiction to hear any complaint filed on that alien's behalf challenging the lawfulness of his custody and treatment."[49] Thus, in the wake of the MCA signing, many civil liberties advocates denounced it as unconstitutional. Regardless, the tides of patriotism and the salience of national security allowed for the bill

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[46] "S. 3930 (109th): Military Commissions Act of 2006," *GovTrack*, accessed April 19, 2021, https://www.govtrack.us/congress/votes/109-2006/s259.
[47] U.S. Congress, Senate, *Military Commissions Act of 2006*, S.3930, 109th Congress, introduced in Senate September 22, 2006, https://www.loc.gov/collections/military-legal-resources/?q=pdf/PL-109-366.pdf.
[48] *Military Commissions Act of 2006*, § 7.
[49] Dorf, "The Orwellian Military Commissions Act of 2006," 16.

to be rushed through Congress with minimal debate, and led to its acceptance by many as a necessary provision.[50]

Despite this, in 2008 the Supreme Court heard the case *Boumediene v. Bush,* which directly challenged the legality of the MCA. After an initial rejection, the Court eventually granted the *certiorari* and heard the case in December of 2007. On June 12, 2008 Justice Kennedy delivered the opinion of the court, which ruled in favor of Boumediene in a 5-4 majority.[51] The Court held that the petitioners had a "constitutional privilege of habeas corpus," and because "the DTA's procedures for reviewing detainees' status are not an adequate and effective substitute for the habeas writ, MCA §7 operates as an unconstitutional suspension of the writ."[52] In this way, the MCA was struck down as unconstitutional, as the Court did not to submit to the notion that "the Constitution necessarily stops where *de jure* sovereignty ends."[53] Thus, the Court's opinion, though slightly narrow in its respect to the treatment of enemy combatants in general, restricted the U.S. government's ability to deny those designated enemy combatants at Guantanamo Bay Prison the writ of habeas corpus.

In reviewing these post-9/11 cases, it becomes clear that the Bush Administration's motivations for using the Guantanamo Bay Prison involved the freedom it granted them to act beyond the jurisdiction of the U.S. judicial system.[54] The Supreme Court's decision in *Boumediene* maintained the trend in the early 2000s of the Courts reigning in the Executive's persistent abridgment of civil liberties in the interest of national security. After *Boumediene*, the designated enemy combatants held at Guantanamo Bay now have a legal right to petition U.S. domestic courts for habeas corpus relief. However, *Boumediene* and cases like it narrowed the scope, as their rulings on jurisdiction only pertain to Guantanamo. The question still remains on what rights are extended to enemy combatants held outside the U.S. and Guantanamo.[55] Evidently, Justice Black's critique contained in his dissent in *Johnson v. Eisentrager* still remains true: "The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned,

[50] Neal Kumar Katyal, "Hamdan v. Rumsfeld: The Legal Academy Goes to Practice," *Harvard Law Review* 120, no. 65 (2006): 104.
[51] *Boumediene v. Bush / Odah v. United States,* 553 U.S. 723 (2008)
[52] *Boumediene v. Bush / Odah v. United States,* 553 U.S. 723 (2008)
[53] "Boumediene v. Bush: Leading Case," *Harvard Law Review* 122, no. 1 (November 2008): 395, 397.
[54] "Boumediene v. Bush: Leading Case," *Harvard Law Review,* 402.
[55] Sidhu, "Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo," 43.

to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations."[56]

The history of United States military conflicts has brought with it not only domestic concerns about national security but also more fundamental questions regarding the rights extended to those deemed enemy combatants. The progression of Supreme Court opinions throughout the Civil War, World War II, and the War on Terror reveals a variation in its jurisprudence. More importantly, however, this progression reveals the important role of the courts in balancing and even restraining the energy of the President in times of war. During World War II, the Courts tended to err on the side of minimal restraint. After the events of the Vietnam War and other drawn-out armed conflicts though, the Court returned to a Civil War Era interpretation of the writ of habeas corpus, aiding in the protection of civil liberties (specifically in Guantanamo Bay). The Court's decisions in the early 2000s seem to cast aside precedent set in World War II in favor of returning to the Civil War-era interpretations. Thus, as is revealed by the cases examined above, the Supreme Court has varied substantially in its treatment of some of the most undesired people to American citizens: enemy combatants.

[56] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).