

# The Right to Habeas Corpus



Most individual rights of Americans are based on the Bill of Rights or another amendment to the Constitution. Habeas corpus is an exception. This ancient legal procedure commands government to show cause—to provide a legal reason—for holding an individual in detention. The literal meaning of habeas corpus, from Latin, is “you should have the body.” This term comes from the opening words of the document, or writ, used during the medieval period in England to require the jailor to bring a suspect to court. This Great Writ, as it became known, is the undeniable right of every American citizen. It receives mention in Article I, Section 9, of the Constitution as one of the limits on the power of Congress: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The framers judged it so essential to liberty that they ensured it could not be abridged except in the gravest circumstances.

The origin of habeas corpus is unclear, but it dates at least to 1215, when King John, under pressure from noblemen, issued the Magna Carta, the Great Charter of English liberty; it was part of the law of the land the king was bound to obey. The original use of habeas corpus was to bring a prisoner into court for trial, but gradually it became a right available to protect individuals against arbitrary detention by the state. During the religious and political turmoil of the seventeenth century, concern grew in England about abuse of power, especially in ecclesiastical or church courts and in royal tribunals such as the Star Chamber, the secret agency used to punish enemies of the state. When abuses continued even after the Star Chamber’s demise in 1641, the Habeas Corpus Act, passed in 1679, reinforced the power of courts to issue the writ and made officials personally liable for disobeying the law.

The colonists brought habeas corpus with them as part of their rights and privileges under English common law. The refusal to grant habeas corpus was a grievance during the decades before independence, so the revolutionary generation wrote guarantees of the right into both state and federal constitutions. The first statute ever passed by Congress, the Judiciary Act of 1789, empowered all federal courts “to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.” State legislatures also passed similar laws. Significantly, anyone—not simply the person under detention—could petition a court to issue a writ. Antislavery advocates took advantage of this feature to bring cases before judges sympathetic to their cause, hoping to secure freedom for slaves who were journeying through free states. Such was the result with Med Maria, a six-year-old slave girl traveling with her mother in Massachusetts in 1836. Abolitionists used a writ of habeas corpus to gain a court ruling that she was being detained illegally by her master because Massachusetts had no law allowing slavery to exist. A more famous use of the writ for the same purpose,

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*“[The writ of habeas corpus] is the great remedy of the citizen or subject against arbitrary or illegal imprisonment; it is the mode by which the judicial power speedily and effectually protects the personal liberty of every individual, and repels the injustice of unconstitutional laws and despotic governments.”*

—William Rawle, *A View of the Constitution of the United States* (1829)

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but with a different outcome, occurred in the Dred Scott case, with the U.S. Supreme Court ultimately deciding that Scott was not a person under the meaning of the Constitution and therefore had no rights.

The Civil War was an important test of the writ of habeas corpus because it raised questions about how far individual rights extend in a national emergency. Soon after Confederate troops fired on Fort Sumter, off the coast of Charleston, South Carolina, in April 1861, pro-secession mobs in northern cities tried to prevent the passage of Union troops, and in border states, southern sympathizers recruited and trained armed volunteers. The law of treason was too muddied to permit confident prosecution of such activity, and state criminal statutes were irrelevant. In response to the crisis, President Abraham Lincoln, claiming extraordinary emergency powers, suspended the writ of habeas corpus and ordered the arrest and detention of persons “dangerous to the public safety.” Military authorities, federal marshals, and Secret Service agents detained hundreds of suspected subversives, often without sufficient evidence to make a definite charge. Civilian judges frequently sought the release of such prisoners, but military officers disregarded their orders.

In 1862, federal officials arrested James B. Merryman, a Confederate recruiter in Maryland, and imprisoned him without trial as a threat to national security. Chief Justice Roger B. Taney, a fellow Marylander and a slaveholder, issued a writ of habeas corpus, and when the President rejected it, he wrote an opinion declaring Lincoln’s suspension of habeas corpus to be unconstitutional, arguing that Congress alone had this power. Lincoln ignored Taney’s protests and continued to suspend the writ in areas where resistance to the war threatened Union victory, including places far removed from the battlefield.

In 1863, Congress retroactively authorized the suspension of habeas corpus but ordered that prisoners be released if grand juries failed to indict them. But what if the military authorities, worried that local courts might release dangerous men, ignored this law? What was the extent of government’s power during wartime? Could it bypass constitutional guarantees of civil liberty, such as the writ of habeas corpus, to protect the nation’s security?

Late in 1864, an arrest and conviction by a military court of an accused traitor from Indiana tested these fundamental questions. The outcome was a decision that still ranks as one of the most important statements of our rights ever issued by the Supreme Court.

Lambdin P. Milligan was an Ohio native who moved to Indiana in the 1830s and turned to law because he could not make a living as a farmer. A respected member of the state bar, he became involved in the antiwar faction of the Indiana Democratic party. Known as Copperheads, after the treacherous snake,

these southern sympathizers in the North were Jeffersonian Democrats who believed in states' rights and in an agricultural society as the best means to preserve liberty. They especially distrusted New Englanders, whom they associated with industrialization, and they had no sympathy with abolition. Milligan, like other Peace Democrats, believed New England capitalists were using the war to enhance their own economic interests, while placing the military burden on common men from the western states.

In the elections of 1862, Indiana Democrats gained strength as public opinion became unsettled about the war, which was not going well for the Union. This sentiment emboldened Milligan, who became convinced that the Emancipation Proclamation was proof that Lincoln had fallen under the influence of abolitionist New Englanders. Believing that the South and West had economic interests in common, he began to campaign for an armistice (truce) and urged Democrats to defend their rights "at all costs." His movement, however, had reached its high point. Union victories in 1863 convinced voters that the tide had turned against the Confederacy, and the Peace Democrats began to lose public support. As a result, Milligan failed to capture his party's nomination for governor in 1864.

Embittered, Milligan joined with sympathizers to form secret societies, clubs designed to further the antiwar cause. One of these societies, the Sons of Liberty, named Milligan an officer, perhaps without his knowledge. The activities of the society did not remain secret for long, and the Republican governor and the commander of the Indiana district of the Union Army employed spies to learn more about its inner workings. The information the agents collected was exaggerated—much of it was based on hearsay—but the reports led to Milligan's arrest for treason. The key evidence was an 1864 speech in which Milligan opposed Lincoln's conduct of the war. Milligan and five others were accused of conspiring to seize arms and ammunition at federal arsenals and to liberate Confederate prisoners held in several northern camps.

The men were tried before a military tribunal, even though civil courts were open and operating in Indiana. Four of the men were found guilty of treason; the military court sentenced three of them to hang. Milligan was one of the three condemned men. After Lincoln's assassination, the new President, Andrew Johnson, commuted Milligan's sentence to life imprisonment, but Milligan refused to compromise. He petitioned a federal circuit court to grant a writ of habeas corpus, arguing that the military had no authority to try him. When the two judges disagreed on the decision, Milligan appealed to the Supreme Court.

The Court agreed unanimously with Milligan. The military court lacked jurisdiction, the justices concluded; the Constitution was not suspended in times of war, and a military trial of civilians while domestic courts were open denied the accused of their rights to a grand jury indictment and trial by jury. Justice David Davis wrote in the Court's opinion: "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies [crises] of government."

A state of war did not suspend the Constitution or its guarantee of individual rights. The framers knew the nation likely would be involved in wars, but they still chose to restrict what the President could do alone because "unlimited pow-

er, wherever lodged at such a time, was especially hazardous to free men.”

Released from prison in April 1866, Milligan sought damages for the time he spent behind bars. He successfully sued the governor, members of the military commission, and others he believed were responsible for his imprisonment, but a recently passed state law limited his award to five dollars. The jury’s verdict mattered most to Milligan, who saw it as vindication of his antiwar belief and actions. He returned home a hero, convinced that his case had established a vital principle of American liberty: government must honor the rights of individuals, even during national emergencies.

Although *Ex Parte Milligan* (“in the matter of Milligan”) was a landmark decision, a federal law passed a year after the Court’s decision gave the writ of habeas corpus much of its modern importance. Congress worried, with good reason, that southern state courts would not protect the rights of newly freed slaves, so it passed the Habeas Corpus Act of 1867. This measure allowed individuals imprisoned or detained under state authority to seek a writ of habeas corpus from a federal court if they believed the state had violated their constitutional rights. The act changed the nature of the writ itself. Previously, it had applied only to questions about the legality of detention before trial; now habeas corpus could be invoked by federal judges to review detention after conviction in both federal and state courts. It marked a significant expansion of federal power and was the most important means of protecting federal constitutional rights until the Supreme Court began to interpret these safeguards as part of the Fourteenth Amendment’s due process clause.

The twentieth century witnessed increased use of habeas corpus in all areas of law, largely because of the expansion of constitutionally protected rights under the Fourteenth Amendment. Its use by prisoners is an especially controversial modern use of the habeas petition. Death row inmates often seek postconviction relief, which is a review after a final judgment to determine whether the trial was fair. The review conducted under a habeas petition is not the same as an appeal. It involves such questions as: Was the defendant informed of his rights? Did he have access to counsel? Was she tried by an impartial jury? These questions address the lawfulness of procedures used in the pretrial, trial, sentencing, or appeal; the petition for a review cannot claim simply that the defendant is innocent. This use of habeas corpus in this manner raises popular concern about delays in the finality of justice. The petitions clog federal court dockets, prompting questions about how far the federal judiciary should be involved in criminal justice, historically a responsibility of the states. In response, both Congress and the Supreme Court in recent years have restricted habeas petitions in capital cases. For all the controversy surrounding their use, however, the vast majority of petitions fail to prove a legal or factual error.

Habeas corpus is an old remedy for testing the lawfulness of all detentions, but its primary importance in American history has been to challenge the power of the executive. When drafting the Constitution, the framers were mindful of their heritage as Englishmen. The history of the mother country had taught them to fear the unchecked power of the executive, so they wrote a document that separated government’s power among three branches—legislative, executive, and judicial. They also provided means to challenge the authorized use of power, especially by the branch directly responsible for administering the law. The writ of habeas corpus was one of those means. It could not be suspended, they agreed, except when necessary to preserve the nation itself.

This principle, of course, is the central meaning of *Ex Parte Milligan*. The Court repeatedly has upheld its declaration that the President cannot suspend the Constitution without the express approval of Congress. Even though it has not applied the decision consistently, as the internment of Japanese Americans during World War II reveals, the justices have never repudiated *Milligan*. Its principles remain central to our democracy, as a 2004 case from the Iraq- Afghanistan conflict demonstrated.

Under the congressional resolution authorizing the use of force, the U.S. military captured an American citizen in Afghanistan, classified him as an enemy combatant, and denied him access to a lawyer or courts. The suspect's father used a writ of habeas corpus to challenge this detention. The justices, in a 6-to-3 vote, rejected the executive's authority to deny access to courts without a congressional suspension of the writ. *Hamdi v. Rumsfeld* recognized the importance of giving the President wide latitude to defend the nation's security but concluded, "it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." American citizens have a fundamental right, the Court declared, "to be free from involuntary confinement by [their] own government without due process of law."

Today, we struggle to reconcile liberty and security, but the constitutional balance point is clear: we value liberty above all else, so we expect any use of governmental power to meet strict tests. One standard is that government must act according to the law. The writ of habeas corpus assures us that we have a means of enforcing this requirement. Its protection of the freedom of the person, Thomas Jefferson noted, is an "essential principle of our government" because it "secures every man here, alien or citizen, against everything which is not law." Arbitrary, unlawful confinement of any citizen is an assault on our individual and collective liberty, and its price is too steep for a free society to pay for its safety. Benjamin Franklin, like other founders, knew this. "They who would give up an essential liberty for temporary security," he wrote, "deserve neither liberty or security." The constitutional privilege of habeas corpus assures us that, in acting lawfully, we have the greatest protection of our security and our freedom.

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*"We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."*

—Justice Sandra Day O'Connor, *Hamdi v. Rumsfeld* (2004)

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## “This Is a Great Bulwark”

*In 1788, ratifying conventions were held in each state to consider whether to approve the new constitution proposed by the convention in Philadelphia the previous year. Voters elected delegates who debated each provision of the document before agreeing to give or withhold consent. The right of habeas corpus, especially the power of Congress to suspend it during times of emergency, drew the attention of these conventions. In this transcript of the Massachusetts debate, delegates voiced their concerns about this power of suspension.*

Judge Sumner said, that this was a restriction on Congress, that the writ of habeas corpus should not be suspended, except in cases of rebellion or invasion. The learned judge then explained the nature of this writ. When a person, said he, is imprisoned, he applies to a judge of the Supreme Court; the judge issues his writ to the jailer, calling upon him to have the body of the person imprisoned before him, with the crime on which he was committed. If it then appears that the person was legally committed, and that he was notailable, he is remanded to prison; if il-

legally confined, he is enlarged. This privilege, he said, is essential to freedom, and therefore the power to suspend it is restricted. On the other hand, the state, he said, might be involved in danger; the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country, without the power to suspend the writ was thus given. Congress have only the power to suspend the privilege to persons committed by their authority. A person committed under the authority of the states will still have a right to this writ.

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*Later during the Massachusetts convention, a delegate named Samuel Nasson argued that citizens should not give up the right of habeas corpus too easily.*

Samuel Nasson: The paragraph that gives Congress power to suspend the writ of habeas corpus, claims a little attention—This is a great bulwark—a great privilege indeed—we ought not, therefore, to give it up, on any slightest pretence. Let us see—how long

it is to be suspended? As long as rebellion or invasion shall continue. This is exceeding loose. Why is not the time limited [sic] as in our Constitution? But, sir, its design would then be defeated—It was the intent, and by it we shall give up one of our greatest privileges.

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## “The Most Celebrated Writ”

*In 1963, the Supreme Court extended the right of habeas corpus, which had been applicable only to federal courts, to individuals who had been convicted in state courts with its decision in Fay v. Noia. Previously, a respect for federalism, especially the states’ primary responsibility for criminal justice, meant that a defendant convicted in state court could be brought before a federal court under a writ of habeas corpus only if he had exhausted all avenues for appeal under state procedures. Under the new rule, the federal judiciary assumed a greater role for protecting the rights of prisoners. In the majority opinion, Justice William Brennan discussed the role of the writ of habeas corpus in protecting individual liberty.*

We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence: “the most celebrated writ in the English law.” . . . It is “a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I.” . . . Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, . . . habeas corpus was early confirmed by Chief Justice John Marshall to be a “great constitutional privilege.” . . .

These are not extravagant expressions. Behind them may be discerned the unceasing contest be-

tween personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.