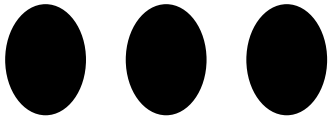
Written by **Steven J. DuBord** on October 3, 2008

Hazards for Habeas Corpus

Rogue public officials consolidating a police state dispatch jack-booted thugs to arrest dissidents. Their victims defend themselves with firearms. Those who are captured are branded "enemy combatants," and held indefinitely, incommunicado, without any specific charges brought against them, with no access to an attorney or hope of a fair trial.



A scenario from Stalin's Russia, contemporary Communist China, or some Third World dictatorship? That, surely. But it could also happen here, in the not-so-distant future.

Too many individuals already in high public office, or who aspire to it, would eagerly embrace a direct route to "social control" by removing or punishing refractory individuals without such bothersome legal technicalities as indictments and trials by jury. Look to the case in April at the FLDS ranch in Texas where nearly 500 children were forcibly taken from their weeping parents with only a court order, not a warrant.

What stands in the way of these budding tyrants? As of now, one main obstacle: habeas corpus — which requires that a detained person be brought before a court to decide the legality of the detention or imprisonment. The first constitutional defense *should be* "We the People" ourselves, through "the Militia of the several States," which the Second Amendment declares are "necessary to the security of a free State." But today, fully constitutional militia are not in place in any state. Available right now — although under attack — is "the Privilege of the Writ of Habeas Corpus" in Article I, Section 9, Clause 2. This "Privilege" — which modern Americans would denote a "fundamental individual right" — is the *only* one the original Constitution (before the Bill of Rights) defines. So its critical importance cannot be gainsaid. (In Article IV, Section 2, the original Constitution also refers to the "Privileges and Immunities of Citizens in the several States," but does not define any of them.) Like the once-strong protections formerly provided by state militia, the protections prevailing because of habeas corpus are being eroded toward nullification.

Importance of Habeas Corpus

"The Privilege of the Writ of Habeas Corpus" derives from Article 39 of the Magna Carta in 1215, that "No free man shall be taken or imprisoned … except by the legal judgment of his peers or by the law of the land." The Magna Carta, however, promulgated no process to enforce this principle. Slowly, though, procedures emerged. First, the writ was invoked to compel defendants to appear in civil actions and criminal prosecutions, and jurors to attend to their duties, in the king's courts. By the 1500s, common-law courts employed the writ to release prisoners being unlawfully detained under color of some other authority. And by the 1600s, expansion of the writ came to be understood as necessary to check abuses of the king's royal prerogative itself.

Standing in the way was the traditional limitation that the writ could not issue in the face of the king's command that a prisoner be detained, even with no reason stated. Thus, in 1627, King Charles I imprisoned several men who had refused to lend him money. Confronted with a warrant signed by the king's attorney general, pliant judges in the Court of King's Bench dismissed the prisoners' petition. An outraged House of Commons responded in 1628 with the Petition of Right, which decreed that "no freeman in any such manner" shall "be imprisoned or detained." In 1640, Parliament authorized the writ to challenge imprisonment under color of a warrant from the king or his Privy Council. Finally, in 1679, Parliament passed the Habeas Corpus Act, which set out definitive procedures for issuing the writ.

The political goad for the Habeas Corpus Act can perhaps be assigned to the high-handedness of King Charles II's henchman, Lord Clarendon, who had been impeached in 1667 for (among other charges) having "advised and procured divers of his majesty's subjects to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law [of habeas corpus], and to produce precedents for the imprisoning of any other of his majesty's subjects in like manner." The act reached every individual "committed or detained … for any crime." When imprisonment rested on a charge of felony or high treason, the act required that prosecution be brought by the next term of court, or the prisoner released on bail. And if prosecution was not thereafter brought, the prisoner was to be "discharged." In addition, the act prohibited the practice of detaining individuals overseas in order to frustrate the courts from issuing the writ.

King James II attempted to circumvent the Habeas Corpus Act by having his judges demand that prisoners post exorbitant bail as a condition of release. In 1689, Parliament responded with the English Bill of Rights, outlawing excessive bail.

Although the Habeas Corpus Act lacked direct application in the American Colonies, colonial courts granted the writ according to common-law principles because Americans asserted the privilege as one of "the rights of Englishmen" to which they were entitled. Along with Alexander Hamilton in *The Federalist*, No. 84, colonial Americans agreed with Sir William Blackstone, the leading legal commentator of that era, that habeas corpus was a bulwark of the British constitution. In his *Commentaries on the Laws of England*, Blackstone explained that

> by … *the habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can long be detained in prison, except in those cases in which the law requires and justifies such detainer.…

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper,… there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas*

corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing. As the Senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger…. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it's [sic] liberty for a while, in order to preserve it for ever.

Not surprisingly, then, upon independence "We the People" secured the writ in Article I, Section 9, Clause 2 of the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Going beyond Blackstone, the Founders recognized that, to avoid dictatorship, not only must the power of suspending the privilege be lodged in the legislature, but also the conditions for suspension must be defined in a supreme law that circumscribes the legislature's authority. Thus, under the Constitution, Congress may enact a statute that suspends the privilege, and the president may execute that statute by detaining individuals, but the judiciary will ultimately determine whether to grant or deny the writ, based on the statute's constitutionality.

Habeas Corpus Extends How Far?

The purpose of the writ of habeas corpus is to require public officials to prove the legal basis for depriving an individual of his liberty.

The privilege of seeking the writ is not limited to particular classes of individuals. Even in *pre*-constitutional British law, it attached to aliens — including enemy aliens — as well as to citizens. And even to slaves, whom most legal theorists of that era believed to enjoy next to no fundamental rights at all, being treated as a species of "property."

The writ also reaches prisoners in places over which, although situated in foreign lands, the United States exercises control, or where officials or agents of the General Government are the actual jailers. This is because officials or agents of the General Government cannot detain anyone anywhere, except insofar as some law of the United States so authorizes them. And they cannot act in any way that the Constitution prohibits, for example by denying even aliens inhabiting territories under the control of the United States "guarantees of certain fundamental rights declared in the Constitution." *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). See also *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885), which correctly concluded that the powers of the United States are not "absolute and unlimited" when exercised in foreign territory, but are always "subject to such restrictions as are expressed in the Constitution." Otherwise, simply by making deals with corrupt foreign rulers, rogue American public officials could operate in overseas enclaves uncontrolled by the Constitution!

Founders' Safeguards

A court hearing a petition for a writ of habeas corpus does not rule on the innocence or guilt of the individual in custody, but only on the custodian's authority to detain him. Absent such authority, the prisoner must be released.

Congress has the power to promulgate standards and procedures for invoking the privilege, under its authority: (i) "To constitute Tribunals inferior to the supreme Court," and by necessary inference the jurisdiction of such "Tribunals" (Article I, Section 8, Clause 9); (ii) to make "Regulations" with respect to the "appellate Jurisdiction" of the Supreme Court (Article III, Section 2, Clause 2); and (iii) "To make all Laws which shall be necessary and proper" for these purposes (Article I, Section 8, Clause 18). And it has a *duty* to do so, as well — because Congress' neglect, failure, or refusal to render the Constitution's

guarantee of the writ meaningful would amount to a tacit suspension of it.

Whatever comports, in terms of comprehensiveness, reliability, and fairness, with the common-law procedures American courts employed in the late 1700s should pass muster today. Nonetheless, these historic processes are only "the absolute minimum." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Therefore Congress may expand on them, to the benefit of persons seeking the writ.

Exercising the powers catalogued above, Congress may suspend the privilege, but *only* "when in Cases of Rebellion or Invasion the public Safety may require it." So suspension requires not only a bare statute, but also circumstances that meet the constitutional criteria. Congress has considered these requirements satisfied in few instances.

In contrast to the General Government, the states are not limited by the Constitution in their authority to suspend the privilege within their own courts — so any limitation on that power must be found in their own constitutions and laws. See *Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917).

A suspension of the privilege entails nothing more: the writ is not suspended, only the privilege of obtaining it if the suspension is valid. Thus, the court in which a prisoner asserts the privilege must determine whether Congress has enacted a suspension, whether the applicant falls within the statute's terms, and whether the statute is constitutional. See *Ex Parte Milligan*, 71 U.S. (4 Wallace) 2, 130-131 (1866).

Supreme Nullification

Unfortunately, we are now living in an era of the warfare-welfare state and the Leader Principle, which defines "patriotism" as blindly following the leader's orders, regardless of the morality or constitutionality of his commands. In the turbulent wake of 9/11, political pressures brigaded with public hysteria generated by propagandists for "the war on terror" are being employed to narrow the scope of "The Privilege of the Writ of Habeas Corpus." The Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), exemplifies the dark course being traveled.

At issue in *Hamdi* was whether an American citizen imprisoned on American soil as an "enemy combatant" could contest his detention by habeas corpus. In a plurality opinion by Justice O'Connor announcing its judgment, the court held "Yes" — but in a manner that radically undermines the constitutional privilege.

The Bush administration contended that Hamdi's status as an "enemy combatant" captured in Afghanistan justified holding him indefinitely without any formal charges or proceedings. And Justice O'Connor agreed that Congress had authorized detention of "enemy combatants." In light of Hamdi's American citizenship, however, this did not support the administration's case. For even during a constitutionally declared "War" — which "the war on terror" is not — a citizen of the United States who is an "enemy combatant" in terms of his behavior is, by constitutional definition, factually and legally a *traitor*. Article III, Section 3, Clause 1 of the Constitution declares that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." And this, *wherever* such conduct occurs, because the Constitution does not say that "Treason" can take place only within the United States.

True, the Constitution provides in Article III, Section 3, Clause 2 that, within certain limitations, "Congress shall have Power to declare the Punishment of Treason." But "Punishment" after conviction is not the same as indefinite imprisonment without trial.

Moreover, the Constitution provides in the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." "Treason" is an "infamous crime." And pursuant to Article III, Section 2, Clause 3, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Furthermore, the Seventh Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the assistance of counsel for his defense."

More specifically, Article III, Section 3, Clause 1 requires that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Which plainly requires a trial — and, where relevant, a "Confession" that is not the result of any compulsion that causes the defendant "in any criminal case to be a witness against himself," contrary to the Fifth Amendment.

Thus, labeling an American citizen an "enemy combatant" provides public officials with no license to imprison him indefinitely without trial. Indeed, that such an individual *has* supposedly engaged in military actions against the United States *confirms his right to the procedures and standards the Constitution prescribes for alleged traitors*.

Apparently on the basis of Hamdi's status as an "enemy combatant," though, Justice O'Connor concluded that he could be imprisoned for as long as "the record establishes that United States troops are still involved in active combat in Afghanistan." Nonetheless, she allowed that Hamdi may still dispute "his enemy-combatant status" by petitioning for a writ of habeas corpus. Yet the question remained, what evidence and legal argument would be allowed, and in what tribunal.

Justice O'Connor opined 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." But, invoking the "potential to burden the Executive at a time of ongoing military conflict," she added: "Hearsay … may need to be accepted as the most reliable available evidence from the Government." Not content to stop there, she encouraged lower courts to "pay proper heed to the matters of national security that might arise in an individual case" — so that, not only redacted hearsay, but even denunciations within undisclosed "classified" information could be treated as "evidence." The Constitution, however, will not suffer hearsay — least of all from secret sources — in a trial for "Treason," but instead requires "the Testimony of two Witnesses to the same overt Act." *Strike one.*

Worse yet, Justice O'Conner held that "the Constitution would not be offended by a presumption in favor of the Government, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." The whole of American legal history in the realm of criminal law, however, refutes this notion: in the United States, the accused is always presumed innocent, until the government proves otherwise beyond a reasonable doubt. *Strike two.*

Worst of all, Justice O'Connor suggested "the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." "Treason," though, is a constitutionally defined crime that must be tried in open court. Habeas corpus is a common-law writ secured by the Constitution. So on what possible *constitutional* basis could any "military tribunal" acquire jurisdiction? *Strike three* — and "The Privilege of the Writ of Habeas Corpus" is "out"!

Thus, the scorecard tells the tale: if "We the People" wish to preserve America's freedoms from what Blackstone denounced as the most "dangerous engine of arbitrary government," we have to step up to the plate.

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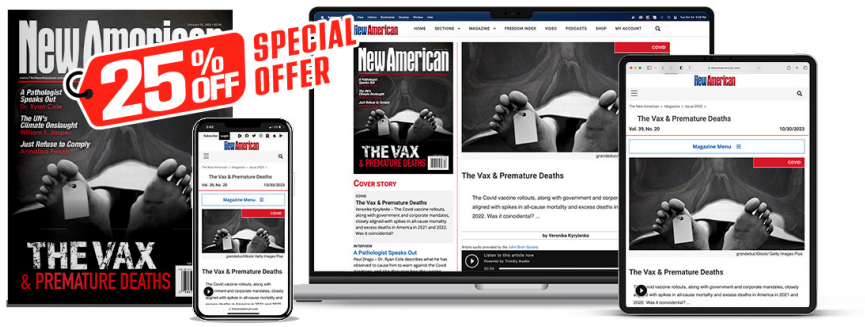

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