# A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies

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Historical comparisons between presidents are notoriously difficult. They involve assessing choices made at different times, under different circumstances, and, often, in the face of varying norms, values, and public expectations. The subject of this symposium is no exception. Comparing President George W. Bush's approach to habeas corpus with President Abraham Lincoln's is no easy task, and certainly not one that can be accomplished with sufficient depth in the brief time we have here today. But even a brief comparison is useful, for it helps illuminate the choices made by each president. And important distinctions can be drawn—distinctions that shed light on our continuing evaluation of the Bush administration's approach to national security issues and that provide another perspective on Lincoln's wartime policies. In essence, while Lincoln's suspension of habeas corpus has rightly been criticized for unnecessarily infringing civil liberties, it differs in quality and in kind from the Bush administration's approach to habeas corpus, which was part of a deliberate assault on the Constitution itself.

I will begin with some brief background on habeas corpus. I will then address the Bush administration's approach to habeas corpus and how it fits into the administration's detention policy in the "war on terror" more generally. I will conclude with a discussion of Lincoln's Civil War suspension of habeas corpus, and how it offers a valuable window into actions taken during the past eight years.

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Derived from the Latin meaning "you have the body," habeas corpus was the most important and celebrated of the English writs to become part of America's legal system.[1] For centuries, the writ of habeas corpus has safeguarded individual liberty by

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1 CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 1 (2006).

affording people seized by the government the right to question the grounds for their detention before a judge.[2] William Blackstone described habeas corpus as a "bulwark of our liberties."[3] Alexander Hamilton deemed the writ the most important protection against arbitrary state power.[4] This country's Founders enshrined the protections of habeas corpus in the Constitution, which provides that the writ shall not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it."[5] This provision—known as the Suspension Clause—has been called "[t]he most important human right in the Constitution."[6] It ensures access to the courts for those imprisoned by the government, and makes possible "the full realization" of other constitutional guarantees.[7]

Habeas corpus, however, does more than protect the freedom of the individual from unlawful physical restraint. It also serves an important structural function in our constitutional system. By preventing the arbitrary exercise of detention power, it helps ensure checks and balances among the branches of government and adherence to the rule of law.[8]

The suspension of habeas corpus, on the other hand, has always been understood as an exceptional power.[9] It is a power that may be exercised, if at all, only in a true exigency and only then as a temporary measure until courts can again perform their required function of examining the basis for a prisoner's detention and dispensing justice.

Over time, habeas corpus has been most commonly employed as a post-conviction remedy—a mechanism for those imprisoned under the judgment of a state or federal court to seek review of their conviction based on constitutional error.[10] However, it is important to remember that habeas corpus historically provided a check against unlawful executive detention, a remedy for those detained without charge, without trial, and without judicial process.[11]

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2 *Id.*

3 1 WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 133 (2002).

4 THE FEDERALIST 84, (A. Hamilton), at 511 (Clinton Rossiter ed. 1961).

5 U.S. CONST. art. I, § 9, cl. 2.

6 Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution,* 32 B. U. L. REV. 143, 143 (1952).

7 David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006).

8 WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 145 (1980).

9 *Id.* at 141.

10 *Id.* at 155–56.

11 Immigr. and Naturalization Services v. St. Cyr, 533 U.S. 289, 301 (2001); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L, REV. 1038, 1238 (1970).

The Bush administration's detention of prisoners at Guantánamo and elsewhere implicated the core function of habeas, for it consisted of an effort to deprive prisoners of all meaningful review of their executive confinement. Further, this confinement was potentially permanent, lasting for the duration of a "war on terror" without any clear end. Centuries ago, the King of England might lock a prisoner in the Tower of London to avoid habeas corpus. After September 11, the President of the United States brought them to Guantánamo.

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After September 11, the Bush administration had to decide where to bring prisoners captured by U.S. forces and how it would treat them. Some of the prisoners had been captured in Afghanistan following the U.S.-led invasion of that country; others, however, had been seized at various places across the globe, from Bosnia to the Gambia.[12]

Guantánamo was not chosen by accident. The Bush administration deliberately brought hundreds of prisoners to the U.S. naval base there because it was located in territory that was controlled entirely by the United States but was not formally part of the United States.[13] As a previously secret Justice Department legal opinion makes clear, the Bush administration believed that this absence of formal sovereignty over Guantánamo meant that habeas corpus would not extend to the territory, therefore avoiding judicial review of the detention and treatment of the prisoners there.[14] At the same time, the Bush administration made a series of determinations that the prisoners at Guantánamo, as well as others held as "enemy combatants," in the global "war on terror," were not entitled to any protections under U.S. or international law, including under the Geneva Conventions.[15] In short, Guantánamo was designed as a legal black hole.

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12 Boumediene v. Bush, 128 S.Ct. 2229, 2241 (2008).

13 HOWARD BALL, BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR 97 (2007).

14 Memorandum from Patrick F. Philbin and John C. Yoo to William J. Haynes II (Dec. 28, 2001), Re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29–37 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005).

15 Memorandum from President George W. Bush to The Vice President, The Secretary of State, The Secretary of Defense, The Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff (Feb. 7, 2002), Humane Treatment of al Qaeda and Taliban Detainees in THE TORTURE PAPERS, *supra* note 14, at 134–35.

In seeking to deny Guantánamo detainees' habeas corpus rights, the Bush administration relied on formal legal constructs, not exigency. It argued that because the detainees were foreign nationals held outside the United States, they were necessarily outside the reach of the federal habeas corpus statute, the Suspension Clause, and the Constitution generally. In other words, the Bush administration did not claim habeas corpus needed to be suspended to deprive Guantánamo detainees of habeas review because they had no right to that review in the first place.[16] The Bush administration further maintained that by designating detainees at Guantánamo as "enemy combatants" it could hold them indefinitely, potentially for life, without charge. The Bush administration also applied the same argument to the thousands of others being detained by the United States outside the nation's borders, including at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan, secret CIA-run prisons (or "black sites"), as well as two individuals (Jose Padilla and Ali al-Marri) seized and held in military detention within the United States.[17] The result: a global-wide detention network that sought to place an entire category of persons permanently beyond the law.

Meanwhile, without court scrutiny, the Bush administration implemented a system of indefinite detention without charge, sham military tribunals, and state-sanctioned torture and abuse authorized at the highest levels of the U.S. government. Further, under the Bush administration's view, any action taken by the executive was legal if done in the name of national security, even if Congress explicitly prohibited that action. Secrecy pervaded every aspect of Guantánamo. Indeed, the Bush administration refused even to disclose the names of the prisoners, many of whom disappeared for years into U.S. custody in violation of basic principles of the U.S. Constitution and international law. The fact that over time Guantánamo would be brought—at least partially—within a legal framework had nothing to do with the Bush administration, which resisted affording detainees any protections and sought to undermine court rulings every step of the way. Rather, it had to do with the resilience of habeas corpus, which ultimately led to three landmark Supreme Court decisions invalidating important components of the Bush administration's post-9/11 detention policy.

16 *See* Jonathan Hafetz, *The Guantanamo Effect and Some Troubling Implications of Limiting Habeas Rights Domestically*, 10 N.Y. CITY L. REV. 351, 351 (2007).

17 BALL, *supra* note 13, at 27–28, 70-71; Hafetz, *supra* note 16, at 354.

The first in that trio, *Rasul v. Bush*, held that Guantánamo detainees had a right to habeas corpus review under federal statute.[18] The Supreme Court, moreover, rebuked the Bush administration for departing from the United States' most fundamental and deeply held legal principles, noting that "[e]xecutive imprisonment has been considered oppressive and lawless" since the Magna Carta.[19] The administration, however, then defied the Supreme Court, trying to block habeas review by creating military boards—known as Combatant Status Review Tribunals—that lacked the most basic elements of due process, denying detainees an opportunity to see and respond to the evidence against them before a neutral decision maker and relying on information gained through torture and other coercion.[20] The administration also pushed Congress twice to amend the federal habeas statute, which had been in place since the Nation's founding, to repeal access to habeas corpus for individuals detained as "enemy combatants."[21]

The second decision, *Hamdan v. Rumsfeld*, reaffirmed detainees' right to habeas corpus and invalidated the military commissions established unilaterally by President Bush to try detainees for war crimes.[22] The Court ruled that the commissions failed to comply with the Uniform Code of Military Justice and the Geneva Conventions.[23] Further, the Court rejected the notion that any prisoner was outside the law, ruling that, at a minimum, the baseline protections of Common Article 3 of the Geneva Conventions applied to all persons in U.S. custody.[24]

The third and final decision, *Boumediene v. Bush*,[25] was the most important and far-reaching. Once again, the Supreme Court ruled that Guantánamo detainees were entitled to habeas corpus.[26] But this time, the Court made clear that the right to habeas was grounded in the Constitution's Suspension Clause, not merely in federal statute, striking down Congress's most

18 Rasul v. Bush, 542 U.S. 466 (2004) (finding a right to habeas corpus under 28 U.S.C. § 2241).

19 *Id.* at 474 (internal quotation marks and citation omitted).

20 *See* Hamdi v. Rumsfeld 542 U.S. 507, 509–13.

21 *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) [hereinafter "DTA"]; Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §948a (2006)) [hereinafter "MCA"].

22 Hamdan v. Rumsfeld, 548 U.S. 557, 558–59 (2006). The Court ruled that the first court-stripping statute, the DTA, did not apply to pending cases. *Id.* at 575–76.

23 *Id.* at 613, 631–32.

24 *Id.*

25 128 S.Ct. 2229 (2008).

26 *Id.* at 2234.

recent court-stripping legislation.[27] Even more importantly, the Court did not limit its ruling to Guantánamo, but instead held that habeas could potentially reach anywhere the United States deprived a person of liberty. The political branches, the Court explained, did not have the power to "switch the Constitution on or off at will" merely by altering the place of detention.[28] Treating detention as a shell game, where a prisoner's location could be shifted to evade habeas review, the Court explained, would make the scope of the Suspension Clause "subject to manipulation by those [Executive branch officials] whose power it is designed to restrain."[29] The Court thus dealt a powerful blow not only to Guantánamo but also to the broader concept of a lawless enclave on which Guantánamo and other post-9/11 detention sites were based.

Supporters of the Bush administration have invoked Lincoln as a historical precedent. Lincoln, they argue, suspended habeas corpus in the exercise of his commander-in-chief power to defend the nation in a time of crisis. Bush merely followed his example by making necessary abridgments of civil liberties in wartime, one of which was to limit access to the federal courts by those detained for security purposes.

Before comparing the two presidents, let us review briefly the actions taken to suspend habeas corpus during Lincoln's administration. Following the firing of the first shots on Fort Sumter by the Confederacy in April 1861, President Lincoln took a number of steps to protect the Union, including calling for the blockage of Southern ports and for the states to supply 75,000 new militia members.[30] Lincoln also authorized army generals to suspend the writ of habeas corpus where necessary "for the public safety," initially along the military line between Philadelphia and Washington (following rioting in Maryland) and later to other places, as far north as Maine.[31] At the time, Lincoln confronted the real prospect that Washington, D.C., might be taken by Confederate forces.[32]

Congress was not in session when Lincoln suspended habeas corpus.[33] When Congress met several months later in a special session (convened by Lincoln), Lincoln defended his suspension of

27 *Id.* at 2243.

28 *Id.* at 2259.

29 *Id*

30 *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 997 (2008).

31 *Id.* at 998.

32 *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 16–17 (2003).

33 *Id.* at 158–59.

the writ in a July 4 message to legislators.[34] He famously asked Congress, "[A]re all the laws *but one* to go unexecuted, and the government itself to go to pieces lest that one be violated?"[35] In effect, Lincoln asserted that in a time of emergency, a president needed the ability to take action to preserve the republic and its constitutional fabric, even if that meant suspending a right as fundamental as habeas corpus.[36]

Although Congress quickly ratified a number of Lincoln's emergency measures, it did not act on his suspension of habeas corpus for almost two years. Then, in March 1863, Congress enacted the Habeas Corpus Act, which authorized the President to suspend habeas corpus in any case within the United States where the public safety might require it.[37] The act, however, also limited the length of time individuals other than prisoners of war could be held without criminal charge.[38]

Lincoln's suspension of habeas corpus during the Civil War led to abuses and deprivations of basic freedoms that, in many instances, could not be justified on grounds of necessity. In addition, many individuals were charged and tried before military commissions, rather than civilian courts, even though some of those military proceedings took place in areas where the civilian courts were open and functioning—a practice the Supreme Court eventually struck down as unconstitutional.[39]

Some of Lincoln's actions also raised significant separation of powers concerns. Perhaps most notably, Lincoln allowed his officers to ignore judicial orders granting habeas relief to prisoners, including one from Roger Taney, Chief Justice of the Supreme Court, sitting as a circuit judge in *Ex parte Merryman*.[40]

Yet, Lincoln's approach to habeas corpus differed from Bush's in important ways—ways that illuminate some of the most deeply problematic aspects of the Bush administration's "war on terror." Lincoln acted out of a genuine sense of exigency, initially suspending habeas corpus when the nation's capital was under siege and, indeed, the nation's survival itself hung in the balance. Admittedly, the suspension power was later exercised more broadly, and extended to areas not under any direct threat. But it was also intended to be temporary, as suspension of

34 *Id.*

35 Abraham Lincoln, Special Session Message (July 4, 1861), 7 COMP. MESSAGES & PAPERS PRES. 3226 (James D. Richardson ed., 1917).

36 FARBER, *supra* note 32, at 159.

37 Act of Mar. 3, 1863, § 1, ch. 81, 12 Stat. 755.

38 *Id.* §§ 2–3.

39 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

40 17 F. Cas. 144 (C.C.D. 1861) (No. 9,487).

ordinary judicial process for a limited period of time when observance of that process was not believed possible or feasible.

Lincoln's suspension also reflected a more limited vision of executive power. Lincoln initially suspended habeas corpus when Congress was not in session—and hence when legislative approval was not an option. To be sure, the suspension continued without congressional imprimatur until March 1863, and led to the imprisonment of more than thirteen thousand individuals in military jails without charges or trial, including newspaper editors considered sympathetic to the Confederate cause.[41] But Lincoln did seek to promptly justify his actions before Congress and, more importantly, never asserted the power to act against the specific instruction of Congress even as he maintained presidential authority to suspend the writ in a time of emergency.[42]

President Bush, by contrast, did not seek temporary limits on habeas corpus, but sought to deny access to the writ to an entire category of people in a conflict he himself insisted was of potentially limitless duration and scope and would last at least several generations. The Bush administration also explicitly discriminated based on alienage, as part of an effort to create a permanent second-class justice system for foreign nationals detained under the elastic and malleable label of "enemy combatant"—an effort that later gained congressional sanction through court-stripping legislation.[43]

The purpose underlying the actions of these two presidents differed in another important respect. At bottom, Lincoln's suspension rested on the notion that in a time of crisis and public danger, habeas corpus might have to be sacrificed temporarily to preserve the public safety and the larger framework of government—a situation expressly contemplated by the Suspension Clause and consistent with the writ's history.[44] President Bush too sought to defend the nation, albeit from a different threat than that which confronted Lincoln—the threat posed by al Qaeda and other terrorist organizations rather than an internal armed rebellion. But, as time has made clear, the Bush administration's efforts to eliminate habeas corpus had little, if anything, to do with security, and everything to do with covering up embarrassment, if not illegality.

41 Steven R. Shapiro, *The Role of the Courts in the War against Terrorism: A Preliminary Assessment*, 29 FLETCHER F. WORLD AFF. 103, 104 (2005).

42 FARBER, *supra* note 32, at 158–59.

43 MCA, *supra* note 21; DTA, *supra* note 21.

44 *See* U.S. CONST. art. I, § 9, cl. 2.

The Bush administration's detention policies were driven by an effort to shield dubious and in some instances patently unlawful practices from public and judicial scrutiny. The administration continued to oppose habeas corpus for detainees at Guantánamo (and elsewhere) in order to evade review of its underlying effort to deny those detainees basic protections under the Constitution and international law, including the Geneva Conventions, to which every prior administration had adhered. Those protections included the right to due process, the right to a fair trial, and the right to be free from torture and other abuse.[45] The Bush administration also opposed habeas corpus because it feared that, in many cases, meaningful review would cause its assertion that the detainees were dangerous terrorists (or "the worst of the worst") to crumble and thereby expose the underlying falsehood on which Guantánamo rested. And, finally, it opposed habeas corpus because it feared that courts would impose checks on its quest for unprecedented and untrammeled executive authority—a power grab encapsulated by David Addington's statement that "We're going to push and push and push until some larger force makes us stop."[46]

Lincoln, by contrast, acknowledged that a president's war powers were constrained by the laws of war and, moreover, sought to codify the laws and usages of war in military regulations so that Union forces could better understand and follow them—an effort that resulted in the "Lieber Code," a foundation for the development of the modern law of war.[47] Lincoln also did not assert the authority as commander-in-chief to override or ignore acts of Congress, as Bush did on numerous important issues, including by claiming the power to disregard the long-established and categorical prohibition against torture.[48] Lincoln's suspension of habeas corpus, in short, did not reflect an effort to expand executive power in a way that was designed to avoid legal constraints and permanently insulate that power from judicial review and accountability.

This is not to deny that there were violations of the laws of war or abuses of individual liberties during Lincoln's presidency.

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45 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 26, 35–36 (William S. Hein & Co., 2004).

46 *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 126 (2007).

47 *See* FRANCIS LIEBER, THE LIEBER CODE OF 1863: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 31 (1863) (General Order No. 100); Barron & Lederman, *supra* note 30, at 994–95; *see also* Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 230–32 (1998) (describing influence of the Lieber Code).

48 *See generally* FARBER, *supra* note 48.

Lincoln's suspension of habeas corpus, moreover, raised significant constitutional concerns, including over the president's emergency power to suspend the writ, for how long, and under what circumstances.[49] But the history surrounding the suspension of habeas corpus during Lincoln's presidency may be understood as a product of the unfortunate, if familiar, tendency toward over-reaction in a time of war.

President Bush's actions toward habeas corpus and the treatment of detainees generally reflect something very different. While Bush administration officials also invoked national security, they sought to eliminate habeas corpus to cover-up illegality, to cloak unlawful detention and mistreatment in secrecy, and to institutionalize an unprecedented expansion of executive power. Their various maneuvers through years of battles over habeas corpus in the courts and in Congress were taken not to defend the rule of law but to undermine it—in defiance of the Constitution and of the truth itself.

49 *See generally* Stephen I. Vladeck, *The* Field *Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 397–415 (2007) (discussing the historical and continuing controversy over Lincoln's suspension of habeas corpus).