# Chapter 13 – The Great Writ before 9/11

## What does the Latin "habeas corpus" mean?

## Where did the right of habeas corpus originate?

## Is it provided for in the US constitution?

## What are the basic requirements for habeas corpus?

## What are other types of administrative detentions where habeas corpus is important?

## Does the constitution provide that the writ can be suspended?

## Does it clearly specify who can suspend it?

## Why was suspending habeas corpus such an issue in the Civil War?

## What did Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) say about who had the right to suspend the write?

## Ex Parte Milligan, 71 US 2 (1866)

### Was the president relying on constitutional or statutory powers?

### What power was he given?

### Where did this happen?

### Was Milligan a rebel soldier?

### How was he arrested and tried?

### What did he do to appeal this?

### What was the key question on appeal?

### What were the facts that Milligan presented to give the court jurisdiction?

### How do these facts undermine the authority of the military commission?

### What are the constitutional rights the court looks to?

### Why did the court say that whether or not the president's war powers authorized the suspension of the writ, it could not be done in this case?

### Why does this also prevent the use of a military tribunal?

### Why does the public safety argument fail?

### Did the court affirm the writ of habeas corpus?

## Notes and Questions

### 1. Presidential Authority to Suspend the Writ?

#### What are the pros and cons of allowing the president to suspend the writ on his own?

#### Does the broad statute in Milligan really limit him beyond the Constitutional limitations?

### 2. What is the effect of suspension?

### 3. Congress’s Authority to Restrict Suspension by the President?

#### How had Congress limited the suspension authority it vested in President Lincoln?

#### Is there any limit on Congress’s ability to regulate the President’s authority to suspend the writ? Did the Milligan decision shed any light on this question?

### 5. Congressional Limits on Routes to Review.

#### What are the limits of congressional power to limit the jurisdiction of the United States Supreme Court?

#### Where does the power to review come in other cases?

#### Can this act be changed?

#### What are the arguments pro and con on whether Congress can prevent the United States Supreme Court from reviewing petitions for habeas corpus?

### 6. Habeas Corpus After September 11.

#### In the massive PENTTBOM investigation that followed the terrorist attacks on September 11, 2001, the Justice Department extended by regulation from 24 to 48 hours the time that an alien suspected of an immigration violation could be held without criminal charges, and it provided for indefinite detention of suspected terrorist aliens.

#### Do you think any of the several hundred persons detained for questioning for an extended period was entitled to a writ of habeas corpus?

## Johnson v. Eisentrager

### [U.S. armed forces captured 21 German nationals in service of German armed forces in China. A U.S. military commission sitting in China tried and convicted them of violating laws of war, namely, engaging in, permitting, or ordering continued military activity against the United States after the surrender of Germany and before the surrender of Japan. After conviction, their sentences were reviewed and approved by military reviewing authority. They were then repatriated to the U.S.-run Landsberg Prison in Germany to serve their sentences]

### They filed a petition for a writ of habeas corpus in the District of Columbia, naming the Secretary of Defense, among others, and asserting that their trial, conviction, and imprisonment violated Articles I and III of the Constitution, the Fifth Amendment, and provisions of the Geneva Convention governing the treatment of prisoners of war.]

### What does Yick Wo v. Hopkins tell us?

### How does the court say that petitioners are different from other prisoners?

### What is the “bring me the body” problem?

### Who else would it be available to under the defendant’s reading?

### What does the dissent say that becomes relevant in the Guantanamo cases?

### Notes and Questions

#### 1. Comparing Milligan and Eisentrager.

##### How were Milligan and Eisentrager different factually in ways that might have affected the availability of the writ to the petitioners?

# Chapter 14 – The Great Writ: Habeas Corpus after 9/11

## Ex Parte Quirin, 317 US 1 (1942)

### Why did the United States Supreme Court uphold a military tribunal in Quirin, which was tried in the US during WW II?

## Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism - P 397

### US Courts have Jurisdiction of Claims of Foreign Detainees - Rasul v. Bush, 124 S.Ct. 2686 (2004)

#### What was the key legal question in Rasul?

#### What was Scalia worried about in Rasul?

### Notes and Questions

#### 2. Eisentrager’s ‘‘Dire Warning.’’

##### Sharply dissenting in Rasul, Justice Scalia quoted the ‘‘dire warning’’ in Johnson v. Eisentrager, 339 U.S. 763 (1950), to suggest that the Court’s ruling would open the floodgates to habeas petitions by enemy aliens after we captured large numbers in battle. Indeed, alien detainees at Guantanamo quickly pressed habeas petitions in U.S. courts.

##### How did the Pentagon try to control this?

#### 3. The Inner Realm of Military Affairs: What’s Left of Eisentrager?

##### What did justice Kennedy say was left of Eisentrager?

#### 6. ‘‘Statutory Entitlement’’ and the Detainee Treatment Act of 2005.

##### How did Congress respond to Rasul?

Passed the Detainee Treatment Act of 2005 (DTA) – review on page 400

##### What then happened in Hamdan v. Rumsfeld, 548 U.S. 557 (2006)?

##### What did the Court find was the Congressional intent?

## B. EXTENDING THE CONSTITUTIONAL WRIT TO GUANTA´NAMO BAY DETAINEES (AND OTHERS?)

### What did Congress do in response to Hamdan?

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

### What did the court not rule on?

### What authority were petitioners detained under?

### Where does this case find its authority for the habeas corpus petition?

### Where did the jurisdictional authority for habeas corpus come from in Rasul?

### What do the terms of the 1934 Treaty provide about Cuba’s sovereignty?

### What is the long standing position of the US on sovereignty on Guantanamo?

### Does the court defer on this issue?

### Why is the court uncomfortable with this result?

### What Eisentrager factors does the court look to?

### How do these petitioners differ from those in Eisentrager as regards to 1)?

### How was the process different in Eisentrager as regards status?

### How is the possession of the prison different from Eisentrager (2)?

### What about 3, the practical obstacles? How might this have changed since 1950?

### Will these proceedings upset the host government?

### Where might this be different?

### Did the court find that Congress had suspended the writ?

### The government argues that the Detainee Treatment Act is an adequate alternative to habeas corpus – what are the two core purposes of the writ that the court compares to the DTA?

### How is See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) used?

### Why is the writ especially important in executive detentions?

### What are the problems with the status determination?

### What increases the risk and cost of errors?

### What is the evidentiary problem with the DTA hearing limitations?

### What does the court find is the critical minimum for a habeas corpus hearing?

### What are the limits on review under the DTA?

### How is this like the FISA court?

### What practical limitations did the court recognize?

### Could we have emergency detentions of suspected looters after hurricanes?

### Did the court find that this was an exigent circumstance?

### What did the majority rule?

### What procedural remedy did the Court allow to simplify the burden on the government?

### What case did the dissent reference as key?

### What was the nationality of the petitioner?

### What did the dissent say the court held in that case that it is ignoring in this case?

## Notes and questions

### 5. Does the Constitutional Writ Extend Beyond Guantanamo Bay?

#### How were the Eisentrager factors used in Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010), which was brought by prisoners in Bagram Air Base?

#### Did Al Maqaleh allow the Administration to create a new ‘‘black hole’’ for detainees?

## Rasul v. Myers, 563 F.3d 527 (DCC 2010)

### What is the background for this case?

### What type of claim is this?

### Why do they get qualified immunity?