Structural Uncertainty Over Habeas Corpus & the Jurisdiction of Military Tribunals

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Most lawyers are familiar with the writ of habeas corpus as the vehicle for a form of more or less limited appellate review of criminal convictions. In time of war, however, habeas corpus returns to its traditional role, dating back to Magna Carta, as a judicial remedy for unlawful detention by the executive branch. And so, today, we see a renewed debate over access to the writ by suspected terrorists detained by the military and susceptible to prosecution before military tribunals. My purpose in this brief comment is not to address the constitutionality of such tribunals, which others have already considered at length.[1] It is, on the contrary, to suggest that this question will not be resolved in any clear-cut way. At least, this is the lesson of the cases from the Civil War and World War II, the two principal sources of law on this subject.[2]

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1 For arguments supporting the constitutionality of the tribunals, see Curtis A. Bradley & Jack L. Goldsmith, The Constitutional Validity of Military Commissions, 5 Green Bag 2d 249 (2002). For arguments against, see Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002); Ronald Dworkin, The Threat to Patriotism, 49 N.Y. Rev. 44 (Feb. 28, 2002); Ronald Dworkin, The Trouble with the Tribunals, 49 N.Y. Rev. 10 (April 25, 2002).

2 The Vietnam conflict, curiously, did not result in rulings from the Supreme Court on the availability of habeas corpus to prisoners or to draftees. The former were beyond the jurisdiction of the federal courts, a matter to which I shall return, and the latter received ample opportunities for judicial review by other means. Oesterreich v. Selective Service System Local Bd., 393 U.S. 233 (1968).

The essential function of the writ of habeas corpus is to determine the legality of detention, including but not limited to issues of constitutionality. As Henry Hart, the leading scholar of the writ of habeas corpus in the twentieth century said, "The great and generating principle of this whole body of law [is] that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus."[3] It is no exaggeration to say that the writ provides the single most important legal protection against executive tyranny and military government.

That said, the writ has not always functioned as this simple model of checks on executive power supposes. President Lincoln, as is well known, unilaterally suspended the writ at the beginning of the Civil War, when his power to do so was at best dubious.[4] The Suspension Clause appears in Article I of the Constitution, in a section limiting the powers of Congress,[5] not in Article II, defining the powers of the President. So far from challenging this assertion of executive power, however, Congress acted promptly to endorse it by passing legislation authorizing what Lincoln had done.[6] This pattern of congressional activism in seeking to suspend the writ was even more apparent during Reconstruction, when it was Congress, over the active opposition of President Johnson, which insisted upon continued military rule in the South.

These ironic twists and turns in the history of habeas corpus illustrate a larger point. After more than two hundred years, we still do not know the scope and dimensions of the protection that it affords against executive detention. We do not know exactly where the civilian rule of law leaves off and martial law begins. My point in surveying the major cases on habeas corpus is to ascertain why this might be so.

I. The Civil War & Reconstruction

Three cases set the boundaries for habeas corpus during the Civil War and in its immediate aftermath: *Ex parte Milligan*,[7] which granted the writ in favor of a United States citizen tried before a military commission; *Ex parte McCardle*,[8] which denied the writ in favor of a Confederate sympathizer during Reconstruction, but without prejudice to having it refiled in a different form; and *Tarble's Case*,[9] which held that the state courts did not have jurisdiction to issue the writ to release a citizen from service in the army.

Ex parte Milligan is the decision, then and now, most protective of individual liberty. Milligan was a citizen charged with conspiring to aid the Confederate cause in his state of residence, Indiana. In the fall of 1864, he was arrested by order of the military commander for the District of Indiana, tried before a military commission, and sentenced to death. After his conviction, a federal grand jury was convened, but refused to hand up an indictment against him. Upon his petition for habeas corpus to the federal circuit court, the judges divided on several crucial questions and certified them to the Supreme Court, which held that the federal court had jurisdiction to issue the writ and that the military commission lacked authority over Milligan as a civilian.

3 Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1393 (1953).
4 Ex parte Merryman, 17 Fed. Cas. 144 (D. Md. 1861) (Taney, Cir. J.).
5 U.S. Const. art. I, § 9.
6 Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.
7 71 U.S. 2 (1866).
8 74 U.S. 506 (1868).
9 80 U.S. 397 (1872).

The first of these holdings often is neglected, but it is nonetheless significant. As a straightforward matter of statutory interpretation, Milligan met the terms for release under the statute authorizing suspension of the writ, which allowed detention for only a limited period of time and required any individual, like Milligan, who was not indicted by a sitting grand jury, to be released.[10] In authorizing a suspension of the writ, Congress took care to avoid a complete ouster of federal jurisdiction over crimes charged against civilians.

In the second and better known part of the opinion, the Supreme Court held that the military commission lacked power over a citizen, not connected with the military, in a state that had not seen overt hostilities, and in which the civilian courts were still open and available.[11] To these factors we might add that Milligan's alleged offense occurred late in the war, when victory was almost assured, and that the Court's decision was handed down after the war had ended. Still, time did not work entirely in Milligan's favor, since he was sentenced to be hanged before the Court could even take the case, and in the event, he was saved only by President Johnson's decision to commute his sentence to life imprisonment.

Ex parte McCardle takes us forward in time to Reconstruction, when McCardle, the editor of a newspaper in Vicksburg, Mississippi, was charged with impeding reconstruction based on the content of his anti-Union editorials. He evidently sought to reverse on his editorial page what Grant had won by his victories on the battlefield. For his efforts, he was brought before a military commission constituted under the statute authorizing military reconstruction. In a writ of habeas corpus filed in federal court, he challenged the constitutionality of military reconstruction, relying in large part on the arguments accepted by the Supreme Court in *Milligan*. The circuit court denied the petition, but released McCardle on bond pending appeal.[12] The effect of the bond was to postpone his trial before the military commission, indefinitely as it turned out.

Just as McCardle was never tried, so too, the Supreme Court never reached the merits of his case. Congress, alarmed that military reconstruction might be held unconstitutional, deprived the Court of jurisdiction by repealing the provisions of a recently enacted statute that authorized appeals in habeas corpus cases.[13] The Court upheld the power of Congress to control its jurisdiction, even in such a heavy-handed manner, relying on the constitutional limit on its appellate jurisdiction for "such Exceptions, and under such Regulations as the Congress shall make."[14]

This ground for the decision, of course, created the risk that Congress would engage in wholesale jurisdiction stripping, denying the Supreme Court any significant role as the head of a separate branch of government. This risk was all the greater since Congress was, at the same time, seeking to gain supremacy over the executive branch through the impeachment and trial of President Johnson. No dubious affairs with White House interns motivated this action, but the same fundamental issue as in *McCardle* itself: opposition to military reconstruction, as vociferous by President Johnson as it was by dissident editors such as

10 71 U.S. at 114-17.

11 *Id.* at 118-27. The four concurring justices also agreed with this reasoning, differing from the majority only on the question whether Congress might have authorized trial before a military tribunal. *Id.* at 136-42 (Chase, C.J., concurring).

12 Charles Fairman, VI History of the Supreme Court of the United States, Reconstruction and Reunion 1864-88 Part One 438-39 (1971).

13 74 U.S. at 512-13.

14 U.S. Const. art. III, § 2.

McCardle.[15]

In order to prevent complete congressional domination of the judiciary, the opinion in *McCardle* ends with a celebrated dictum allowing an appeal by other means. To be sure, the Court said, we do not have jurisdiction to hear this appeal under the recent legislation and its still more recent repeal, but we do have it under the First Judiciary Act which authorizes a writ of habeas corpus to be filed directly in the Supreme Court. Congress had neglected to cut off this avenue of appellate review, illustrating the reluctance of both branches of government to precipitate an irreconcilable conflict over the writ of habeas corpus.[16]

No doubt McCardle himself would quickly have taken advantage of this alternative, but events overtook his case. While it was pending in the Supreme Court, largely because of delays deliberately undertaken by the justices themselves, President Johnson had been acquitted by the Senate and military reconstruction in Mississippi was winding down.[17] Accordingly, the military commission before which McCardle would have been tried was soon disbanded and he remained free without ever facing trial.[18]

A final case from this era, *Tarble's Case*, at last gives us a square holding on jurisdiction on habeas corpus. Yet even this holding must be qualified. *Tarble's Case* concerned a writ of habeas corpus sought on behalf of a recruit to the Army, this time after the Civil War had ended. Tarble's father evidently felt that his son was too young to enlist and ought to be released, and he filed a petition seeking relief in state court, rather than in the federal courts to which Milligan and McCardle had turned. The state court granted the writ, but the Supreme Court reversed, holding that state courts have no power to interfere with individuals in custody or under the control of federal officers. Recent experience, as the Court dryly noted, had shown abundant evidence of the power of people in some states "to embarrass the operations of the government."[19] Hardly any other decision was imaginable so soon after the Civil War.

Yet the opinion must be interpreted against the background of *Milligan* and *McCardle*. The door to the state courts could be closed only if the door to the federal courts remained open. If Congress shut off all avenues of relief, its action would constitute a suspension of the writ of habeas corpus. As we have seen, even when Congress is willing to take this step, it does so with qualifications that preserve the role of the ordinary civil courts. The precedents from the Civil War and Reconstruction therefore leave the constitutional foundations of the writ of habeas corpus in some uncertainty, paradoxically because even in the midst of the nation's greatest crisis, the political branches of government were unwilling to test the limits of their powers. This pattern of avoidance continues in the cases from World War II.

II. World War II

Executive power to control the writ of habeas corpus was at its height at the outbreak of

15 The connection between *McCardle* and the impeachment of Andrew Johnson is recounted in Bruce Ackerman, 2 We the People: Transformations 223-30 (1998).

16 74 U.S. at 515.

17 But not before another case had arisen challenging the constitutionality of military reconstruction in Mississippi. *Ex parte Yerger*, 75 U.S. 85 (1869), like *McCardle*, involved a prosecution before a military commission that failed to yield a decision on the merits before the prosecution was dropped. Fairman, note 12 *supra*, at 584-90.

18 See *id.* at 492 n.206.

19 80 U.S. at 408.

World War II. Broad and seemingly unquestioned restrictions on the writ of habeas corpus were upheld in *Ex parte Quirin*,[20] a case from 1942 involving German saboteurs, two of whom were (at least at one time) American citizens. As the war continued, however, the power of the writ revived, as evidenced by the 1944 decision in *Ex parte Endo*[21] ordering the release of an American citizen of Japanese descent from an internment camp. In a pattern much like that from the Civil War, the decisions after the war raised as many issues as the decisions during it. The most restrictive of these is *Johnson v. Eisentrager*,[22] allowing no review by habeas corpus of prosecutions of aliens before military commissions outside the United States. Other decisions from this period complicate the law, but these three cases reveal the full range of decisions on habeas corpus, from full review to no review at all.

Ex parte Quirin stands in sharp contrast to *Ex parte Milligan* and has been thought by some to undermine the validity of the earlier decision. One of the petitioners in *Quirin* was an American citizen (the other citizen did not petition for habeas corpus); their illegal activities took place in the United States, which otherwise was free of hostile activity, and the trial before the military commission was also in this country, where the civilian courts, of course, remained open. *Quirin* involved eight members of the German military who came ashore in two separate landings in New York and Florida, hid their uniforms, changed into civilian clothes, and then fanned out across the country to engage in acts of sabotage. They were all promptly captured, in a strange twist, because two of them reported their activities to the FBI. They were tried before a military commission while a petition for habeas corpus was considered by the Supreme Court, and after it was denied, but before any opinion could be written, they were convicted, sentenced to death, and six of the eight were executed.[23]

The single fact that distinguishes *Quirin* from *Milligan* concerns the evidence that the prisoners had violated the laws of war.[24] Acting as belligerents not in military uniform, the prisoners lost the protection that would ordinarily be accorded to military combatants under the Geneva Convention on treatment of prisoners of war. The actions charged against the prisoners also took them outside the constitutional protections normally accorded in criminal proceedings, including the right to a jury trial. The military commission therefore had jurisdiction to try the prisoners and their petition for habeas corpus was denied.

Once granted the premise that the prisoners violated the laws of war, the Supreme Court's ultimate decision appears to be inescapable: the laws of war are peculiarly within the competence of military tribunals; and by violating those laws, the prisoners forfeited the protections that they would otherwise receive.

The Court properly assumed that jurisdiction on habeas corpus existed, despite President Roosevelt's attempt to suspend the writ by executive order, but then limited the scope of its review to avoid detailed inquiry into the military commission's compliance with the Articles of War as enacted by Congress.[25] This last step is the most problematic in the opinion,[26] but whatever force it

20 317 U.S. 1 (1942).

21 323 U.S. 283 (1944).

22 339 U.S. 763 (1950).

23 David J. Danelski, The Saboteurs' Case, 1 J. Sup. Ct. Hist. 61, 72 (1996).

24 317 U.S. at 29.

25 *Id.* at 24-25, 47-48.

26 G. Edward White, Felix Frankfurter's "Soliloquy" in *Ex parte Quirin*: Nazi Sabotage and Constitutional Conundrums, 5 Green Bag 2d 423, 429-32 (2002); Danelski, *supra* note 23, at 76-80.

has results from the evidence in the record that the prisoners acted in violation of the laws of war. The charges brought against them could not alone have served this function, because those charges were framed by the very officials whose authority was being challenged. Moreover, *Milligan* could not be distinguished from *Quirin* on this ground because similar charges of sabotage could have been – and indeed, were – brought on the facts of that case.[27]

The factual background of *Quirin* exercised a pervasive influence over the decision, from the haste with which the Roosevelt Administration rushed the prisoners towards their dooms to the substance of the charges against them. The evidence against them was overwhelming and the principal defense offered on their behalf was that they had tried to dupe their German superiors and intended to defect once they were put ashore.[28] This defense perhaps has some plausibility, but it was corroborated only by the say-so of the saboteurs who reported themselves to the FBI and then only after their landing party had been discovered by a member of the Coast Guard.[29] In any event, this defense did nothing to detract from the jurisdictional facts supporting the authority of the military tribunal, namely that the saboteurs were not in uniform and were put ashore to act on behalf of a hostile power. In a case like *Milligan*, where the nature of the illegal activity is less clear, and the evidence less persuasive, judges would take a much closer look at the jurisdiction of the military tribunal commission.

Ex parte Endo was one such case, decided over two years later, when the war was going much better for the Allies. Endo was an American citizen of Japanese descent. She had been detained at relocation centers, first in eastern California and then in Utah. She sought her release on the ground that she was a loyal citizen who posed no threat to the security of the country and whose continued detention therefore exceeded the powers of the War Relocation Authority, the civilian authority in charge of excluding and detaining individuals of Japanese national origin, whether aliens or citizens. Although nominally a civilian agency, it was under the control of a military commander and was constituted under an executive order and legislation invoking the war powers of the federal government.[30]

In the Supreme Court, the government conceded Endo's claim to be a loyal citizen and that there was no further reason to detain her. These concessions made it all but certain that the Supreme Court would order her release, leaving uncertain only the ground for its decision. This turned out to be as narrow as possible. The Court construed the statute and executive order authorizing Endo's exclusion from coastal areas to allow her detention only until her loyalty could be ascertained. The Court took this step in part to avoid constitutional questions that would otherwise be raised by the detention of loyal citizens.[31] In leaving those questions unresolved, of course, the Court continued the tradition of avoiding confrontation with the other branches of government.

This strategy was particularly appropriate in *Endo* because it was decided the same day as

27 71 U.S. at 6-7.

28 317 U.S. at 25 n.4.

29 White, *supra* note 26, at 425.

30 323 U.S. at 287-88, 297-98. The Court emphasized the civilian nature of the Authority mainly to indicate that Endo had not been accused of any violation of the laws of war. *Id.* at 298.

31 For a similar decision narrowly construing the authority of the governor of Hawaii to declare martial law and suspend the writ of habeas corpus, see Duncan v. Kahanomoku, 327 U.S. 304 (1945).

Korematsu v. United States,[32] the infamous decision upholding the constitutionality of the Japanese exclusion orders. Exclusion, the Court reasoned, had to be distinguished from continued detention. This nice legal distinction, whatever else it accomplished, limited the precedential significance of both cases. The power to exclude that *Korematsu* gave the government in wartime, initially invoked when the outcome of the conflict was in doubt, was limited by *Endo* when detention proved to be unnecessary and victory appeared to be assured.

Johnson v. Eisentrager was decided after victory was complete, although not before the Cold War had once again made the powers of military commissions a significant issue. Eisentrager and his fellow prisoners were German nationals who, after the German surrender at the end of World War II, continued to assist Japanese forces in the Far East before the later surrender of Japan. They were tried and convicted by a military commission in Shanghai and eventually imprisoned at an American military base in Germany. Petitions for habeas corpus were filed on their behalf in the District of Columbia. The district court denied relief and the case was appealed, first to the court of appeals and then to the Supreme Court.

The Supreme Court's opinion rests in part on the absence of the petitioners from the territorial jurisdiction of the federal court, a ground that has been undermined – at least with respect to U.S. citizens – by a subsequent decision finding jurisdiction over the officer having custody of the prisoner to be sufficient.[33] Other territorial aspects of the decision have endured, including the fact that the acts charged against the prisoners occurred overseas in connection with hostilities there. The prisoners were also enemy aliens who were tried overseas in connection with military activity there, and as in *Quirin*, they were charged with violation of the laws of war for acting contrary to the terms of Germany's unconditional surrender to the Allies, which required all of its nationals to cease hostile activities. On these facts, the Court held, there was no jurisdiction on habeas corpus.[34]

It is no coincidence that the recently constructed Camp X-Ray in Guantanomo Bay appears to have been built according to specifications derived from *Eisentrager.* The facts in *Eisentrager* stand at one extreme in limiting the scope of habeas corpus, and conversely, in expanding the power of military commissions.[35] These facts fall under three broad categories: who, where, and when. As to who, Eisentrager and his fellow prisoners were noncitizens and combatants who acted allegedly in violation of the laws of war. Denying them access to the writ would have no effect on the rights of citizens, or of noncombatants, or even of combatants not charged with war crimes. As to where, their activities took place overseas and they were tried and incarcerated there. The decision had no effect on the operation of the civilian courts in the United States. Only on the issue

32 323 U.S. 214 (1944).

33 Braden v. 30th Judicial District, 410 U.S. 484, 498 (1973).

34 339 U.S. at 785-90.

35 Several other decisions, also from the immediate post-war period, denied relief on similar facts, although with varying rationales. See, *e.g.*, In re Yamashita, 327 U.S. 1 (1946) (asserting jurisdiction but upholding military commission in the Philippines, at the time a U.S. territory); Hirota v. MacArthur, 338 U.S. 197 (1948) (no jurisdiction over war crimes tribunal established by Allies); Madsen v. Kinsella, 343 U.S. 341 (1952) (prosecution of military dependent for crime committed on overseas military base). For a comprehensive treatment of the earlier cases in this series, see Charles Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587 (1949).

of when could an argument be made that habeas corpus should have been allowed. World War II had long been over; the nation faced no emergency in dealing with German prisoners; and limits on the writ of habeas corpus could not be justified as a matter of national security. As applied to the current war on terrorism, of course, this factor cuts in exactly the opposite direction. We are at the beginning of a conflict filled with uncertainty over its dimensions and methods and even the nature of our enemy.

III. The Present Implications of Past Decisions

What is the continuing significance of these cases for our present situation? It is easier to offer a negative than a positive answer to this question. We should not expect a quick resolution of fundamental controversies over the writ of habeas corpus that have persisted for well over a hundred years. The same interests that have led the executive branch and the judiciary to avoid confrontation over these issues in the past also are present today. The recent actions of the Bush Administration confirm this conclusion.

The executive order authorizing military commissions to try terrorist suspects provides that they shall have no right to seek relief in "any court of the United States."[36] Yet the White House Counsel, Alberto Gonzalez, quickly backed off this position and admitted that suspects could seek a writ of habeas corpus.[37] The executive order, on his view, did not strip the federal courts of jurisdiction to grant relief and presumably the Bush Administration will take that view in litigation. More tellingly, the order applies only to suspects who are not United States citizens,[38] explaining why John Walker Lindh has been prosecuted in federal court and why a prisoner in Camp X-Ray recently discovered to be a citizen has been transferred to this country. The very location of Camp X-Ray – the likely place of trial, as well as detention – establishes a further limit on the practical operation of the order. It is outside the territorial jurisdiction of any ordinary American court. So, too, the charges against the prisoners there have been limited to acts outside the United States. By contrast, Zacarias Moussaoui, an alleged conspirator in the terrorist attacks of September 11 who was detained on immigration charges in the United States before the attacks occurred, is also being tried in federal court. The decision to try Lindh and Moussaoui in federal court reveals how far the Bush Administration is willing to go to avoid a confrontation over the right to habeas corpus.

The motivation for this reluctance rests in no small part on the uncertainty created by prior decisions. Without clear assurance that the writ will be denied, the government risks too much in bringing cases before a military commission in which habeas relief might be granted. The government has therefore tailored its actions as closely as possible to the facts of *Eisentrager*, where the jurisdiction of a military commission poses the least possible threat to the normal operation of the federal courts. To generalize only slightly, the only clear jurisdictional rules we have on habeas corpus to review the actions of military commissions are those that favor the power of the federal courts. *Tarble's Case* denies jurisdiction to the state courts over cases involving federal

36 Military Order of President George W. Bush, November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 7(b)(2).

37 Alberto Gonzalez, Martial Justice, Full and Fair, New York Times A25 (Nov. 30, 2001).

38 Military Order § 1(a).

custody and *Eisentrager* denies jurisdiction to the federal courts only over cases involving aliens detained overseas. Just as the Supreme Court has tailored these rules to preserve federal judicial power, the executive branch has been reluctant to challenge that power, and, in particular, to call for reconsideration of *Milligan* and the power of a federal court to issue habeas corpus on behalf of a citizen involved in activity in this country where the federal courts remain open.

To be sure, even if such a challenge were made and even if it failed, no federal court would allow the unconditional release of a terrorist, who would instead find his case simply transferred from a military commission to a federal court. He would remain in custody just like Lindh, Moussaoui, and the recently identified citizen in Camp X-Ray. But the precedent established by any decision removing a prisoner from military custody would constrain the government in its future actions in the war against terrorism. Paradoxically, the government's success in the current war, as in past wars, works against its prospects for success in litigation. If no further terrorist attacks threaten the United States, restrictions on habeas corpus will appear to be less necessary. Moreover, by the time any case gets to the Supreme Court, the government will be faced with a situation more and more like that in *Milligan* or *Endo*, where the writ was granted, rather than that in *Quirin*, where it was denied.

A federal district court has already denied a writ of habeas corpus on behalf of prisoners in Camp X-Ray, partly on grounds of standing and partly on the basis of *Eisentrager*.[39] I predict that future decisions will also deny relief. Stronger cases for granting relief from executive custody cannot arise so long as the government charges defendants, like Lindh and Moussaoui, in ordinary criminal proceedings in federal court. More pressing cases are likely to concern aliens currently held in custody on immigration charges,[40] but these cases do not call the power of the military into question. Instead, they involve the complicated network of necessarily limited rights that aliens have to continue to reside in this country. These issues are not unique to time of war.

The profound uncertainty in the law of habeas corpus may be unsatisfactory to law professors who seek a coherent and persuasive rationale for the decisions that we have, and to others who have more immediate interests in these controversies. My purpose has not been to adjudicate among the powerful and complex arguments that can be offered by both sides in these debates. It is, instead, to suggest that the arguments that prove ultimately to be persuasive must engage the interests of the federal judiciary in preserving its central institutional role in defining and protecting our fundamental liberties. The multiple factors of who, where, and when that figure in the past precedents allow the federal courts a necessary degree of flexibility in accomplishing this aim. Confronted as we are now, with new threats to our security, and to our liberty as well, the uncertainty in the law discourages rash

39 U.S. Judge Dismisses Challenge to Detentions, Washington Post A15 (Feb. 22, 2002).

40 The most recent decisions on this issue are Zadvydas v. Davis, 533 U.S. 678 (2001) and INS v. St. Cyr, 533 U.S. 289 (2001). These decisions also illustrate that, even after Bush v. Gore, 531 U.S. 98 (2000), the Supreme Court is cautious about resolving all the issues surrounding the writ of habeas corpus. As the Court said in *Zadvydas*, "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696.

actions by the President to restrict access to the writ of habeas corpus. At the same time, it allows judges to fashion new rules appropriate to the situation we now face. Clear and certain legal rules may have little to recommend them in uncertain times. This, in any event, is the lesson of the history of habeas corpus in time of war.