John Marshall and the Enemy Alien

A Case Missing from the Canon

Gerald L. Neuman & Charles F. Hobson

In recent debates about the rights and remedies of wartime detainees, much attention has focused on precedents from the Second World War, the Civil War, and occasionally the War of 1812.[1] One intriguing piece of evidence has been missing from these debates, however: an unreported decision of Chief Justice John Marshall on circuit in 1813, releasing an enemy alien from executive detention. Contemporary newspapers noted the decision, and the order books of the circuit court preserve the concise final judgment. But these accounts have not been republished in modern legal sources,[2] and the decision did not find its way into the edition of the Papers of John Marshall.[3] Our purpose here is to make this precedent more widely available, with some brief comments placing it in context.

The Alien Enemies Act of 1798, which is still in force in modified form, authorizes the President to detain, relocate, or deport enemy aliens in time of war.[4] It was enacted in 1798 in anticipation of war with France, but first employed against British aliens during the War of 1812. A few weeks after Congress declared war, Secretary of State James Monroe issued a notice ordering all British sub-

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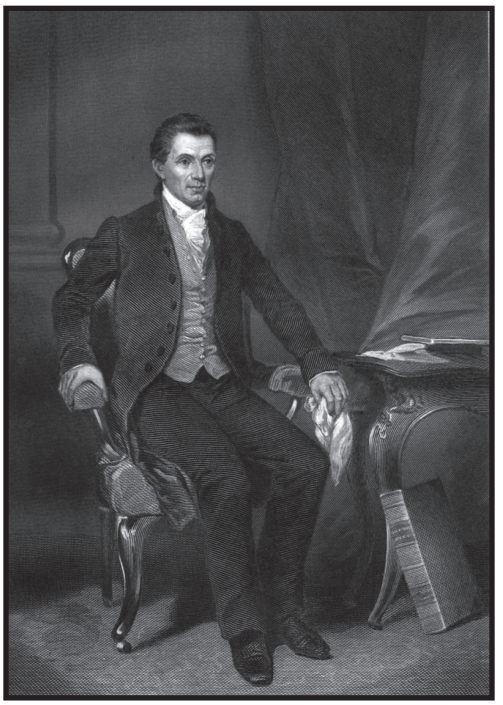
1 See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); id. at 2667 (Scalia, J., dissenting); Ingrid Brunk Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. 1567 (2004).

2 The decision is described, but not reproduced, in Dwight F. Henderson, Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801–1829, at 107 (1985).

3 The Papers of John Marshall (Charles F. Hobson et al., eds., 1974–2006) (twelve volumes, published by University of North Carolina Press). The twelfth and final volume of the edition is to be published in Spring 2006.

4 Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (currently codified at 50 U.S.C. §§ 21–24). In 1955, however, the United States agreed to limits on the exercise of that power by adhering to the Fourth Geneva Convention. See Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 38, 42, 6 U.S.T. 3516, 75 U.N.T.S. 287.



Secretary of State James Monroe. E.A. Duyckinck, National Portrait Gallery of Eminent Americans (1862).

jects to report themselves to U.S. marshals.[5] Throughout the war, the act was implemented by U.S. marshals under the supervision of the State Department, after April 1813 through the efforts of a "Commissary General for Prisoners of War, including the superintendancy of Alien Enemies" appointed by the President.[6] In October 1812, instructions from Monroe to the marshals directed that if enemy aliens arrived in their districts from abroad, the marshals should "designate for them particular places of residence, at least thirty miles distant from the tide-water, to the limits of which designations they are to be confined."[7] In February 1813, further instructions from Monroe expanded this regime to enemy aliens already residing within forty miles of tidewater, requiring those engaged in commerce to "apply to the marshals of the states or territories in which they respectively are, for passports to retire to such places, beyond that distance from tide water, as may be designated by the marshals."[8] Resident enemy aliens not connected with commerce could, however, be allowed to remain with permission from the marshal, renewed monthly. Enemy aliens who failed to comply were "to be taken into custody, and conveyed to the place assigned to them, unless special circumstances require indulgence."[9]

One fully reported decision addressed the availability of the writ of habeas corpus as a remedy for enemy aliens challenging the resulting detention. In *Lockington's Case*, a British resident of Philadelphia had been imprisoned after failing to comply with a federal marshal's order to relocate to Reading.[10]

5 See Henderson, supra, at 100; The Case of Alien Enemies, Considered and Decided upon a Writ of Habeas Corpus Allowed on the Petition of Charles Lockington, an Alien Enemy by the Hon. William Tilghman, Chief Justice of the Supreme Court of Pennsylvania, The 22nd Day of November, 1813, reported by Richard Bache (Philadelphia 1813), appendix at iii-iv [hereinafter cited as Bache] (reprinting Notice of July 7, 1812).

6 See Henderson at 102; Anthony G. Dietz, The Use of Cartel Vessels During the War of 1812, 28 American Neptune 165, 166–67 (1968). Madison appointed John Mason, son of George Mason, to that position in April 1813. His functions as Commissary General included implementing detention policies for both prisoners of war and enemy alien civilians, and negotiating exchange of prisoners of war with the British. Mason was a merchant and investor and served as federal Superintendent of the Indian Trade from 1807 to 1815. His only military experience was as Brigadier General of the District of Columbia Militia from 1802 to 1811. See Willard J. Webb, John Mason of Analostan Island, 5 Arlington Hist. Mag. 21 (Oct. 1976).

7 Henderson at 101; Bache at vi (Instruction of Oct. 13, 1812).

8 Henderson, at 100–01; Bache at v (Notice of Feb. 23, 1813).

9 Bache at vii (Instruction of Feb. 23, 1813).

10 Bright. (N.P.) 269 (Pa. 1813–14). The report subsequently published in Brightly's 1851 volume of Penn-

He sought release on habeas corpus from the Pennsylvania Supreme Court, but lost on the merits. Two of the Pennsylvania justices held that enemy aliens were entitled to a determination of the lawfulness of their detention, and concluded that Lockington was lawfully detained.[11] The third, Justice Brackenridge, maintained that habeas corpus could not issue to interfere with executive control of enemy aliens.[12] In the course of his opinion, Justice Brackenridge noted that a report of a decision (unnamed by him) had been "read from a gazette," in which Chief Justice Marshall on circuit had granted the writ on behalf of an enemy alien irregularly detained.[13] Brackenridge respectfully disagreed, arguing that neither state nor federal courts had authority to review this kind of detention.

As it turns out,[14] the unnamed decision is *United States v. Thomas Williams*, decided by the U.S. Circuit Court for the District of Virginia on December 4, 1813. A report in the *Virginia Patriot* of December 14, 1813 was reprinted in *Poulson's American Daily Advertiser* of December 20, 1813, and in the *Charleston Courier* of December 21, 1813. The *Daily Advertiser*, published in Philadelphia, is presumably the "gazette" read to the court in *Lockington's Case*. Its account reads as follows:

A Short Report
Of a Late Decision on the question concerning alien enemies.

On Monday the 6th inst. the Circuit Court of the United States for the District of Virginia closed – Chief Justice Marshall, and St. George Tucker, District Judge, attending. During the term Mr. Hiort moved the Court for a writ of Habeas Corpus to bring up the body of Thomas Williams confined in the Jail of the City of Richmond, as having been sent there by the Marshal of the District of Virginia, charged as being an alien enemy, *and to hold him until an opportunity offered to remove him. The ground taken by Mr. Hiort were constitutionally to interpret the Laws of the Land, and not to give too much power, into the hands of any ministerial officer where there was a judicial power.*

On Saturday preceding, the Chief Justice stated that "no place having been assigned by the Marshal, that Thomas Williams should be removed to, he ought to be discharged," and the Marshal by his war-

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sylvania cases consolidates decisions on two petitions for habeas corpus, one by the Chief Justice of the Supreme Court of Pennsylvania in November 1813, and a second by the court en banc in January 1814. Bache's pamphlet, issued between the two rulings, includes the first of these decisions, along with lengthy reports of the arguments of counsel and an appendix of statutes and regulations. See Bache, supra. The two decisions were also published in 5 Hall's American Law Journal 301 (1814).

11 Bright. (N.P.) at 283–84 (opinion of Tilghman, C.J.); id. at 285, 293 (opinion of Yeates, J.). At this period, state courts often employed the writ of habeas corpus to inquire into the legality of federal detention, although the Supreme Court would later hold that they lacked such power in Ableman v. Booth, 62 U.S. (21 How.) 506 (1858), and Tarble's Case, 80 U.S. (13 Wall.) 397 (1871).

12 Bright. (N.P.) at 301 (opinion of Brackenridge, J.).

13 Bright. (N.P.) at 296 (opinion of Brackenridge, J.).

14 Neuman noted the possible existence of this decision in a discussion of Lockington's Case in Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 993–94 (1998). Hobson first learned of it in 2001, when Neuman called his attention to the Lockington reference. At that time Hobson undertook a fruitless search for the "gazette." He also searched the U.S. Circuit Court, Va., Order Books for 1813, but the writing was too faint to read on microfilm. There matters stood until August 2005, when Hobson by chance saw the reference to the case in Henderson, supra. It was then an easy matter to find the newspaper report. Hobson later copied the order book entries from the original at the Library of Virginia in Richmond. The discovery came too late for the case to be included in an addendum section of Volume 12 of the Marshall Papers, which was then in press.

> *rant discharged him accordingly*. [Virginia Patriot.][15]

The records of the circuit court reveal the following sequence of events. Thomas Williams was committed to the county jail on Saturday, November 20.[16] On Thursday, November 25, the court (John Marshall sitting alone) awarded a writ of habeas corpus commanding the jailor to bring Williams before the court "on tomorrow morning eleven o'clock."[17] The next day, Williams was brought into court (Marshall again sitting alone), "and the Court not being advised what judgment to make in the premises, take time to consider thereof."[18] On Saturday, December 4, Marshall and St. George Tucker ordered Williams to be released, and he was freed. The judgment was entered in the circuit court's order book on Monday, December 6, the last day of the term, as follows:

> On the petition of Thomas Williams, (who is confined in the Jail of the County of Henrico by the Marshal of the Virginia District, and who was brought before this Court on the twenty sixth day of the last month, together with the cause of his detention, by virtue of a writ of habeas corpus, to the Jailor of the said County of Henrico directed,) the Court is of opinion; that the regulations made by the President of the United States respecting alien enemies, do not authorize the confinement of the petitioner in this case; Therefore, It is ordered that he be discharged from the custody of the Jailor so far as he is detained therein by virtue of the warrant of commitment from the Marshal of this District.[19]

Taken together, these surviving records of *United States v. Thomas Williams* address a number of issues. First, they demonstrate John Marshall's agreement with the position taken by the majority in *Lockington's Case* – that detention of a conceded enemy alien under the purported authority of the Alien Enemies Act was not per se immune from judicial inquiry on habeas corpus. The actual grant of the writ on behalf of an enemy alien provides even stronger evidence for this proposition than the discussion in *Lockington's Case*, where the majority exercised jurisdiction but denied relief on the merits. Second, it appears that counsel for Williams

15 Poulson's American Daily Advertiser, Dec. 20, 1813, at 2. The texts of the reports, under different headlines, are essentially identical, with variations in capitalization and punctuation. The Daily Advertiser version given above is included in the Readex Early American Newspaper series, also available online at infoweb.newsbank.com.

16 This date appears in an account submitted by the Richmond jailor, William Rose, for keeping two federal prisoners during the year 1813. Rose charged the United States $5.10 for keeping Williams from November 20 until December 4. William Rose, Account as Keeper of the Jail, U.S. Circuit Court, Va., Ended Cases (Unrestored), Library of Virginia, 1813.

17 U.S. Circuit Court, Va., Order Book No. 9 (1811–1816), at 240. The case is entered as United States v. Thomas Williams. The U.S. Circuit Court Order Book is held at the Library of Virginia, and copies are available on microfilm.

The Thomas Williams in question may have been the one who reported himself to the marshal as a resident of Richmond, 30 years of age, with a wife, having been in the United States for four years, and working as a stone cutter. See Kenneth Scott, British Aliens in the United States During the War of 1812, at 332 (1979) (reprinting data from the marshals= returns to the State Department).

His counsel was probably Henry Hiort, a native of England who practiced in Norfolk and the District of Columbia. See The Willis Family, 6 Wm. & Mary Q. (1st ser.) 27 (1897). Hiort represented the petitioner in Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806), and was on the government=s team in Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807).

18 Id. at 243.

19 Id. at 264.

Judge St. George Tucker of the United States District Court for the District of Virginia, along with Chief Justice John Marshall, sitting on circuit, ordered the release on habeas corpus of the alien Thomas Williams. 9 Green Bag 202 (1897).

raised an issue concerning the interpretation of the Alien Enemies Act that was also addressed in *Lockington's Case*, whether the judicial proceedings authorized by the second section of the act were the exclusive means of implementation, or whether the President's orders could also be enforced directly by executive officials. Marshall's disposition of the *Williams* case made it unnecessary to answer that question, but the Pennsylvania court held that judicial enforcement was not required.[20] Third, Marshall ordered Williams released because "the regulations made by the President" (actually, by the State Department) did not authorize his confinement. The news report clarifies the reason: the marshal had not designated a place to which Williams should remove, as the official instructions required, and given him the opportunity to remain at liberty. Thus, the writ protected the individual's liberty against a subordinate official's action in excess of delegated authority, not a constitutional or statutory violation.

Marshall's decision in *Williams* actually goes further than the twentieth-century cases in reviewing detention of enemy aliens, including the Supreme Court's decision in *Ludecke v. Watkins*.[21] In that case, Justice Felix Frankfurter explained for the majority that the Alien Enemies Act barred judicial review of whether an enemy alien was dangerous and should be removed. In various passages of the opinion, Frankfurter noted that issues subject to habeas inquiry included whether the petitioner was truly an enemy alien, whether the petitioner was over the statutory age of fourteen, and the "construction and validity of the statute."[22] Review did not extend, however, to compliance with the standard set forth in the President's proclamation – that "alien enemies … who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof" may be removed.[23] Frankfurter observed that removal depended on what the Attorney General "deemed" the detainee to be,[24] not on whether he was actually dangerous, but also asserted, "A war power of the President not subject to

20 Justice Bushrod Washington later confirmed this interpretation on circuit in a damages action brought by Lockington against the marshal, decided after the war ended. See Lockington v. Smith, 15 F. Cas. 758, 761 (C.C.D. Pa. 1817) (No. 8448). The government continued to apply this interpretation during the First and Second World Wars.

21 335 U.S. 160 (1948) (upholding removal of detained German national to Germany after its surrender but before official termination of the state of war).

22 See id. at 171 & n.17. Frankfurter left open whether a court could decide how long after the termination of a war the President's powers under the statute would expire. Id. at 169.

23 Pres. Proc. 2655, 10 Fed. Reg. 8947 (1945).

24 335 U.S. at 165.

judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized."[25] Dicta in *Ludecke* thus suggest a narrower scope of review on habeas corpus than the review that Marshall afforded, releasing Williams on the ground that the marshal had exceeded the President's regulations. It might be that the more limited character of the authority exercised by President Madison and Secretary Monroe in 1813 explains the different scope of review. Or it might be that judicial deference to the exercise of executive war powers by subordinate officials has increased since the early nineteenth century.

Marshall's less imperial view of executive war powers in *Williams* is consistent with his better-known statement about the Alien Enemies Act, a dictum in *Brown v. United States*,[26] decided a few months later. There he observed, "The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."[27] It is also more broadly consistent with his insistence on the rule of law in his most famous habeas corpus decision, *Ex parte Bollman*.[28] There the Court released two participants in Aaron Burr's conspiracy from pretrial detention on treason charges, insisting that the tendency of such charges to agitate public passions increased the need for temperate inquiry from the courts.

The jurisdictional question in the *Lockington* and *Williams* cases should be seen in the light of the English tradition of denying the writ to prisoners of war and, later, to interned alien enemies.[29] R.J. Sharpe, in his treatise on English habeas corpus law, describes a long-standing uncertainty over whether this denial rests on an incapacity based on status or on the absence of merit to the claim.[30] Sharpe explains that the practice is best explained as merits-based: admission of enemy status demonstrates that detention is within Crown prerogative and thus lawful, whereas prisoners of war and detained non-combatants do have capacity to sue on other claims.[31] *Lockington* and *Williams* suggest that the United States settled on this solution early in its history, at least with regard to enemy aliens. Executive detention of enemy aliens may be authorized, but habeas corpus lies to determine the boundaries of that authorization.

It should be emphasized that both *Lockington* and *Williams* involved enemy nationals detained by civil authorities because of their formal status under the Alien Enemies Act, not combatants detained by military authorities. Whether that distinction was crucial at the time is uncertain. During the War of 1812, both imprisoned enemy alien civilians and

25 Id. at 166.

26 12 U.S. (8 Cranch) 110 (1814). In Brown, decided March 2, 1814, the Supreme Court held, over Justice Joseph Story's dissent, that the declaration of war did not by its own force result in a confiscation of enemy property within U.S. territory.

27 Id. at 126.

28 8 U.S. (4 Cranch) 75 (1807).

29 See R. v. Bottrill, ex parte Kuechenmeister, [1946] 2 All. E. R. 434 (C.A.) (denying habeas corpus to interned enemy alien); R. v. Superintendant of Vine Street Police Station, ex parte Liebmann, [1916] 1 K.B. 268 (same); Three Spanish Sailors Case, 2 W. Bl. 1324 (1779) (denying habeas corpus to prisoners of war); R. v. Schriever, 2 Burr. 765 (1759) (same).

30 R.J. Sharpe, The Law of Habeas Corpus 112–14 (1st ed. 1976).

31 Id. at 113–14. On the general capacity of enemy aliens to sue in the United States, see Ex parte Kawato, 317 U.S. 69 (1942) (permitting admiralty suit by interned enemy alien); Clarke v. Morey, 10 Johns. 69 (N.Y. 1813) (Kent, C.J.) (permitting contract action by resident enemy alien).

captured combatants not released on parole were held in state jails by U.S. marshals under the oversight of the Commissary General for Prisoners. In *Lockington's Case*, however, the judges distinguished enemy aliens from prisoners of war,[32] and Chief Justice Tilghman suggested that the latter would not be entitled to the privilege of habeas corpus.[33] Justice Brackenridge would have denied the writ equally to both categories.[34] John Marshall expressed no view on the subject of prisoners of war in the available records of the *Williams* case.

However that may be, the *Williams* case constitutes a striking addition to Chief Justice Marshall's legacy, and a datum relevant to debates about the historical reach of habeas corpus in wartime.

32 Bright. (N.P.) at 276 (Tilghman, C.J.); id. at 289 (opinion of Yeates, J.); id. at 395 (Brackenridge, J., dissenting).

33 Bright. (N.P.) at 276 (Tilghman, C.J.).

34 Bright. (N.P.) at 295-96 (Brackenridge, J.).