

2009

## Habeas Corpus Writ of Liberty, Boumediene and Beyond

Scott J. Shackelford

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### Recommended Citation

Scott J. Shackelford, *Habeas Corpus Writ of Liberty, Boumediene and Beyond*, 57 Clev. St. L. Rev. 671 (2009)

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## BOOK REVIEW

### HABEAS CORPUS WRIT OF LIBERTY, *BOUMEDIENE* AND BEYOND

*Review of* HABEAS CORPUS WRIT OF LIBERTY: ENGLISH AND AMERICAN ORIGINS AND DEVELOPMENT. By Robert Searles Walker, Ph.D., United States: BookSurge LLC, 2006. Pp 138. \$14.99.

SCOTT J. SHACKELFORD\*

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For nearly eight-hundred years, the writ of habeas corpus has been a bulwark against the unlimited exercise of executive power, first in England and later the United States.<sup>1</sup> From 1219 to the Bush Administration, the argument for a strong executive has been the same—that in times of crisis and emergency, it is the executive’s responsibility to preserve and protect the homeland, even if that means curtailing personal freedom in the process. Such unchecked power, though, naturally threatens the foundations of liberty upon which a free society is built. Over the centuries, England and the United States have grappled with this balancing act, which is mirrored in the evolution of the writ of habeas corpus itself. Ultimately, after 500 years of development, habeas corpus evolved into a robust check on the Crown’s power to arbitrarily detain. It was deemed so critical to liberty that it alone among the great writs was incorporated into the U.S. Constitution,<sup>2</sup> arguably becoming the most important original human rights provision prior to the introduction of the Bill of Rights.

Throughout much of U.S. history, habeas corpus has continued the English tradition of being a check on executive power and thus bolstering the separation of powers. In its most vigorous interpretation, habeas corpus is a right of personal liberty, i.e., the right to be free from arbitrary seizure and detention.<sup>3</sup> But there have been many notorious episodes in which personal liberty has been sacrificed on the altar of national security—from President Lincoln’s suspension of the writ during the

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\* Mr. Shackelford is a graduate of Stanford Law School and a Ph.D. Candidate, University of Cambridge Department of Politics and International Studies. The author wishes to thank Professor Norman Spaulding for his guidance in developing this book review. He also would like to thank his wife Emily Shackelford for her continuing love and support.

<sup>1</sup> The full name of the writ at issue is “habeas corpus ad subjiciendum et recipiendum,” but it will be referred to as simply “habeas corpus” hereinafter for simplicity’s sake.

<sup>2</sup> “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.” U.S. CONST. art. I, § 9, cl. 2.

<sup>3</sup> In judicial terms, the writ is a command directed to a specific jailer to produce a named prisoner together with the legal cause of detention in order that the legal warrant of detention be examined. Without the writ, a person can simply “disappear” without recourse or reason in law. ROBERT SEARLES WALKER, *HABEAS CORPUS WRIT OF LIBERTY* 2-3 (Booksurge 2006).

Civil War to President Roosevelt's decision to suspend the writ along the West Coast of the United States during World War II.<sup>4</sup> More recently, the writ of liberty has been threatened again by the indefinite detention of alleged "enemy combatants" in Guantanamo Bay, Cuba, as part of the Bush Administration's "War on Terror" under the Military Commissions Act of 2006 ("MCA").<sup>5</sup> Once again, though, the writ of liberty has proven more lasting than a unitary executive. The Supreme Court in *Hamdan v. Rumsfeld*<sup>6</sup> and later in *Boumediene v. Bush*<sup>7</sup> determined that detainees do have a constitutional right to habeas corpus despite being foreign nationals held *de jure*, if not *de facto*, in a foreign nation. In its decisions, the Court relied on a comparative analysis of the writ of habeas corpus in English and U.S. law that proved dispositive both to the future of the detainees at Guantanamo specifically, as well as to the scope of habeas corpus as the writ of liberty generally. In an effort to better understand the convoluted history of this fundamental writ, this book review summarizes and critiques one of the few comprehensive, contemporary accounts of the evolution of habeas corpus in England and the United States entitled *Habeas Corpus Writ of Liberty: English and American Origins and Development*, by Robert Walker.<sup>8</sup> It then focuses on how Justice Kennedy's majority opinion in *Boumediene*,<sup>9</sup> which came down after this book was published, upheld the finest traditions of habeas corpus as being a robust tool against unlimited executive power. The review concludes by arguing that procedural barriers must be lowered for the writ of liberty to reach its full potential as a guarantor of post-conviction relief for unlawful or arbitrary detention.

#### I. SUMMARY OF *HABEAS CORPUS WRIT OF LIBERTY*

In *Habeas Corpus Writ of Liberty*, Walker examines the constitutional and legal development of habeas corpus as the writ of liberty by focusing on its English roots that continue to have a profound effect on U.S. habeas jurisprudence, as was recently so evident in *Boumediene*. The book is structured in four chapters, the first three focusing on English common law and the last chapter investigating the development of the writ in U.S. law. In Chapter I, Walker summarizes the early medieval history of the writ, arguing that as early as 1199, a rudimentary form of habeas corpus as a kind of forcible summons was in use.<sup>10</sup> Interestingly though, he notes that in twelfth-

<sup>4</sup> *Id.* at 114, 117. Besides President Lincoln, President Grant suspended the writ in part of South Carolina acting upon the Ku Klux Klan Act, while the Philippines did so in 1905, and the Governor of Hawaii did in 1941. *Id.* at 115.

<sup>5</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (codified in scattered sections of 10, 18, 28, 42 U.S.C.).

<sup>6</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

<sup>7</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

<sup>8</sup> ROBERT SEARLES WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* (Okla. State Univ.) (1960) and ROBERT SEARLES WALKER, *THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY* (Okla. State Univ.) (1961) reprinted in ROBERT SEARLES WALKER, *HABEAS CORPUS WRIT OF LIBERTY: ENGLISH AND AMERICAN ORIGINS AND DEVELOPMENT* (Booksurge LLC 2006).

<sup>9</sup> *Boumediene*, 128 S. Ct. at 2229-79.

<sup>10</sup> *Id.* at 12-13.

and thirteenth-century England, no writ ran against the King, who was the source of them—judges were merely the King’s obedient servants.<sup>11</sup> Separation of powers was not an issue since there was one power, the Crown. Walker argues that this began to change through burgeoning due process protections found in Chapter 29 of the Great Charter trumpeting the beginning of an English constitutional order.<sup>12</sup> However, throughout the fourteenth century, the courts continued to use procedures convenient for the King, while Parliament continued to petition for the prohibition of such practices.<sup>13</sup> This highlights the fact that the story of habeas corpus is the story of the evolution of the separation of powers, which was also shown in stark relief in *Boumediene* as discussed below. From its basis as a summons, habeas corpus gradually expanded, becoming a mechanism to gather parties and juries to ensure the adequate representation of contending interests, and morphing into a test for the validity of commitments by the first part of the fourteenth century.<sup>14</sup>

In Chapter II, the author focuses on the late sixteenth century in some detail, as this was a time when the writ came into more frequent use, strengthening its independent position as a common law process.<sup>15</sup> Also during this period, Walker demonstrates how the writ was used as a weapon in a power struggle between the courts, much as it still is used in state and federal U.S. courts today. In England during this time period, Puritans used the writ in common law courts through an alliance with common lawyers as a means to undermine ecclesiastical courts and the High Commission, which both groups despised.<sup>16</sup> Going into the seventeenth century though, the nature of habeas corpus as a lever helping to ensure the separation of powers had still not been realized since the Privy Council and the Bench still cooperated in promoting executive power.<sup>17</sup>

In Chapter III, Walker examines the constitutional conflicts of the seventeenth century and the emergence of the writ of liberty. The power struggle, not among the branches per se but between the courts, continued: “Greedy for jurisdiction and seized of the notion that they represented the paramount law administering agencies of the state, these [common law] courts never tired of restricting the activities of other tribunals whenever and wherever possible.”<sup>18</sup> Though case law was muddled

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<sup>11</sup> *Id.* at 8. It is interesting to note here that this same criticism was also leveled at the Fourth Circuit after its holding in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) nearly a millennium later.

<sup>12</sup> WALKER, *supra* note 8, at 8. In particular, Chapter 29 stated: “No free man shall be taken or imprisoned or dispossessed or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers and by the law of the land.” *Id.*

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.* at 18.

<sup>15</sup> *Id.* at 28.

<sup>16</sup> *Id.* at 31-32.

<sup>17</sup> *Id.* at 57-58.

<sup>18</sup> *Id.* at 50. Common lawyers were against the ecclesiastical courts and the High Commission in part because of the procedure of the *ex officio* oath that failed to require a reading of the charges at trial, among other omissions. *Id.* at 51.

during this period, and efforts at asserting judicial authority were far from fully effective, Parliament acted to impose restraints on executive power. With this new statutory power, judges who refused to grant a properly presented habeas petition were financially liable for damages.<sup>19</sup> Perhaps in part because of this, the writ was seldom refused in the Chancery, King's Bench, Common Pleas, or the Exchequer in the seventeenth century, unless doing so would be an abuse of process.<sup>20</sup> But many problems remained.<sup>21</sup> In response, Parliament enacted the Habeas Corpus Act of 1679. Even though this statute was concerned with procedure in criminal commitments, the Act remedied many daunting problems with habeas corpus, including giving two days for the court to act on a habeas petition (which stands in stark contrast to the years the Guantanamo prisoners have had to wait), while section six of the Act outlawed double jeopardy for the first time in English history.<sup>22</sup> Together, these provisions made habeas corpus the most efficacious safeguard of personal liberty yet devised.

Finally, in Chapter IV, Walker concludes the volume by analyzing the U.S. reception of the writ of liberty. Going into some detail, Walker summarizes how habeas corpus came to American shores as early as the 1620s, though it did not come into widespread use until the 1690s in part because martial law was needed in many colonies to preserve public order as late as 1636.<sup>23</sup> Moreover, as in medieval England, there were no separation of powers in many early colonial governments—frontier justice abounded.<sup>24</sup> It was also uncommon to incarcerate either before or after adjudication during this period in U.S. history—the Essex County Court of Massachusetts, for example, averaged 1.8 imprisonments per year over a forty-five year period.<sup>25</sup> Gradually, this situation changed as the colonies developed socially and legally, leading Virginia to enjoy habeas corpus through royal proclamation.<sup>26</sup> Other colonies soon followed suit—South Carolina adopted the English Habeas Corpus Act of 1679 nearly verbatim in 1712, and seven colonies had enacted it into statute by 1800.<sup>27</sup> Among all of these interpretations of the writ, Walker argues that the Constitution of Massachusetts of 1780 best summarized the American attitude when it provided in Article VII that the writ of habeas corpus ought to be provided “. . . in the most free, easy, cheap, expeditious, and ample manner.”<sup>28</sup> Given this

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<sup>19</sup> *Id.* at 83-84.

<sup>20</sup> *Id.* at 80.

<sup>21</sup> *Id.* In particular, Walker notes that prior to the 1679 Act: (1) there was no way to compel prompt return of the person; (2) nor were there regulations of the transfer of prisoners; (3) retrying freed persons on the same charges was common; and (4) judges continued to be unwilling to examine the truth. *Id.* at 81-82.

<sup>22</sup> *Id.* at 84.

<sup>23</sup> *Id.* at 92.

<sup>24</sup> *Id.* at 94.

<sup>25</sup> *Id.* at 95.

<sup>26</sup> *Id.* at 102.

<sup>27</sup> *Id.* at 101-03.

<sup>28</sup> *Id.* at 103-04.

widespread acceptance, there was no debate in Congress when it came time to extend the writ of habeas corpus to the newly created federal courts in the Judiciary Act of 1789. The author then walks through how the writ gained new meaning through the U.S. Courts<sup>29</sup> all the way up to *Padilla v. Hanft*.<sup>30</sup>

## II. CRITIQUE OF *HABEAS CORPUS WRIT OF LIBERTY*

The strengths of *Habeas Corpus Writ of Liberty* are manifold, and its contemporary importance is assured. One need only consider the extent to which Justice Kennedy expounded both the English and U.S. history of the writ of habeas corpus in reaching the *Boumediene* decision to realize the important subject matter with which this volume deals. Though the entire book is well written and concise, the summary and conclusion of the English legal history of the writ of habeas corpus on pages 86-90 is by far the most powerful part, replete with many useful examples illustrating the dynamic evolution of the writ in English law. Walker also does a thorough job of investigating the early history of the writ in U.S. jurisprudence and its statutes in both state statutes and constitutions, as well as laying out how old tensions are continuing to play out in contemporary issues, notably the procedural history of the *Padilla* case. Given that there have been few other books dedicated to the English and U.S. history of habeas corpus since 2001, this volume occupies an important space and is an extremely useful resource in ongoing debates about the scope, meaning, and purpose of habeas corpus.

Brevity is both a strength and a weakness of this book. A comparative legal history of the writ of habeas corpus could fill volumes, but Walker chose to introduce the material in four succinct chapters. Several historical epochs are surveyed in comparatively exhaustive detail, such as the sixteenth and seventeenth centuries, while others are relatively absent. For example, no mention is made of what the current status of the writ of habeas corpus is in English common law. Nor is there much comparative analysis between English and U.S. habeas jurisprudence post-1789. Rather, the author simply notes that English and U.S. habeas law diverged following independence without giving any examples as to how exactly this has occurred or taking a normative stance on which system is preferable beyond the explicit criticism of the Fourth Circuit's holding in *Padilla*.<sup>31</sup> The author also offers several blanket sentiments, such as stating that the judiciary is the "smallest and weakest branch of government" without offering any support or limiting that proposition to a specific time or place.<sup>32</sup> Further, the new introduction and summary sections, although helpful to the reader, could easily have been expanded to offer greater historical context. Finally, though the author made the decision not to update the original legal history articles that comprise the bulk of this volume since they had

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<sup>29</sup> See, e.g., *Ex parte Bollman*, 8 U.S. 75 (1807), in which the basic question asked was whether the alleged expansion of the Supreme Court's original jurisdiction to include writs of habeas corpus was constitutional in light of *Marbury v. Madison*, 5 U.S. 137 (1803). Marshall answered that this case dealt with the Court's appellate jurisdiction, which was subject to congressional amendment. *Bollman*, 8 U.S. at 100-01.

<sup>30</sup> *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

<sup>31</sup> WALKER, *supra* note 8, at 129-34.

<sup>32</sup> *Id.* at v.

been thoroughly cited, this left the book feeling somewhat disjointed and incomplete. Overall though, *Habeas Corpus Writ of Liberty* is both an excellent introduction to habeas corpus for the general reader and a useful resource for the legal historian.

The utility of Walker's analysis in *Habeas Corpus Writ of Liberty* is evident in that it echoes current conflicts between U.S. state and federal courts regarding the scope of the writ of liberty that may be traced back centuries to battles between English common and ecclesiastical courts. These conflicts were resolved in England in favor of the broad use of habeas corpus, which I will argue is also a desirable outcome in the United States and would take the form of both state and federal courts being able to enforce the writ and thereby overcome procedural barriers. Following this sentiment, I contend that the *Boumediene* decision revitalized habeas corpus by reasserting the place of Article III courts to decide what the law is and thus ensuring the separation of powers in the aftermath of the Fourth Circuit's *Padilla* holding. However, although *Boumediene* was a significant step forwards in this regard, I conclude by arguing that the true promise of habeas corpus cannot be fulfilled without lowering procedural barriers to evoking habeas corpus in both federal and state courts in line with the model "easy, cheap, expeditious, and ample manner" standard enumerated in the Massachusetts Constitution of 1780.<sup>33</sup> The necessity of promoting judicial efficiency through finality should not be privileged over the robust procedural protections necessary to secure liberty.

The evolution of modern U.S. habeas law has seen reenactments of many of the same conflicts that for so long animated English habeas jurisprudence, especially with regard to what I call "intra-court conflicts," as well as issues regarding the proper separation of powers between the branches. In the first case, Walker discusses in *Habeas Corpus Writ of Liberty* instances in which habeas corpus was used by common lawyers in ecclesiastical courts to undermine these courts' power in favor of the common law courts preferred by Puritans.<sup>34</sup> Although it took generations, cases such as *Darnell's Case*<sup>35</sup> in 1627 raised such passions that even though the King frequently won cases, he lost the political war that followed. This opened the door to the 1679 Habeas Corpus Act itself and the widespread adoption of habeas relief.<sup>36</sup>

U.S. courts were spared religion-based conflicts, but they have experienced something similar in the debate over the spheres of authority for habeas review in federal and state courts. At first the use of national habeas corpus to test state commitments was prohibited, even though state courts were permitted to test federal commitments through their process,<sup>37</sup> resulting in state courts determining the validity of federal processes and law, while the national courts were unable to discharge a state prisoner held in violation of the federal Constitution.<sup>38</sup> By 1833, the situation was reversed; however, it took until 1867 for Congress to grant the

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<sup>33</sup> *Id.* at 103-04. See also MASS. CONST. of 1780, ch. VI, art. VII

<sup>34</sup> WALKER, *supra* note 8, at 30-32.

<sup>35</sup> *Id.* at 136.

<sup>36</sup> *Id.* at 64.

<sup>37</sup> *Id.* at 110.

<sup>38</sup> *Id.*

federal courts authority to issue habeas corpus in all cases “where any person may be restrained of his or her liberty in violation of the Constitution.”<sup>39</sup> This “constitutional moment” in the aftermath of the U.S. Civil War may be to some extent comparable to the political revolution that occurred in the aftermath of the English Civil War and underscores the trend that, after periods of internal strife characterized by the suspension of civil rights, habeas corpus often is reasserted and made available to more people than was the case before. Still, habeas review remains far from universally accepted in U.S. courts, such as the fact that state courts cannot hear habeas review of federal prisoners, as seen in *Ableman v. Booth*<sup>40</sup> and reinforced by *Tarble’s Case*.<sup>41</sup> England (in the immediate post-September 2001 and July 2005 attacks),<sup>42</sup> the United States Congress (in 1958 in response to *Brown v. Allen*<sup>43</sup> and again in 1996 with the Antiterrorism and Effective Death Penalty Act<sup>44</sup>), and the President (through the Military Commissions Act<sup>45</sup>) have at times sought to curtail habeas corpus. But if English and early American history is any guide, the Bush Administration’s legal battles in the War on Terror will likely end up strengthening habeas corpus rather than weakening it, as illustrated by President Obama’s recent decision to end the use of “enemy combatant” justifications in litigation<sup>46</sup> and the Court’s recent habeas holdings.

The second separation of powers point evident in *Habeas Corpus Writ of Liberty* that has been replete throughout both English and U.S. legal history is the use of habeas corpus as a tool to leverage one branch or institution of the government against another. This struggle may be seen in the most recent habeas case to reach the Supreme Court—*Boumediene v. Bush*.<sup>47</sup> In this case, the question before the Court was whether aliens designated as enemy combatants should be able to challenge their detention through the writ of habeas corpus.<sup>48</sup> In reaching its decision, the Court undertook a survey of the Suspension Clause, stating that “given the unique status of Guantanamo Bay and the particular dangers of terrorism in the

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<sup>39</sup> *Id.* at 111. See also Act to Amend the Judiciary Act of 1789, Ch.27, §1, 14 Stat. 385 (1867).

<sup>40</sup> *Ableman v. Booth*, 62 U.S. 506 (1859).

<sup>41</sup> *Tarble’s Case*, 80 U.S. 397, 401 (1871).

<sup>42</sup> Gordon Brown, *42-Day Detention; A Fair Solution*, TIMESONLINE, June 2, 2008, [http://www.timesonline.co.uk/tol/comment/columnists/guest\\_contributors/article4045210.ece](http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article4045210.ece) (last visited Mar. 21, 2009).

<sup>43</sup> *Brown v. Allen*, 344 U.S. 443 (1953).

<sup>44</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>45</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>46</sup> William Douglas & Carol Rosenberg, *Obama Administration Dropping ‘Enemy Combatant’ Term*, MIAMI HERALD, Mar. 14, 2009, available at <http://www.miamiherald.com/news/nation/story/949260.html> (last visited Mar. 21, 2009).

<sup>47</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>48</sup> Gregory S. McNeal, *Beyond Guantanamo: Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29, 29-30 (2008).



modern age, . . . courts simply may not have confronted cases with close parallels to this one.”<sup>49</sup> Nevertheless, the Court concluded “that the writ of habeas corpus may only be suspended in cases of invasion or rebellion,”<sup>50</sup> thus avoiding the “cyclical abuses”<sup>51</sup> by the Executive Branch that have long plagued application of the writ. “The Suspension Clause, according to the Court, protects ‘a time-tested device, the writ’ and that protection is intended ‘to maintain the delicate balance of governance’ between the executive branch and the judiciary.”<sup>52</sup> As a result, a majority of the Court found “that Section 7 of the MCA . . . stripped courts of the ability to review the propriety of detention other than by procedures established in the Detainee Treatment Act of 2005,”<sup>53</sup> and did not offer an adequate substitute for a robust writ of habeas corpus.

The Court’s holding in *Boumediene* is consistent with the now established principle from *Ex parte Merryman*,<sup>54</sup> sustained in *Ex parte Milligan*,<sup>55</sup> and later *Hamdan*,<sup>56</sup> that the President does not have authority to unilaterally suspend the writ.<sup>57</sup> What is interesting in this case is the extent to which concerns over the fundamental issue of the separation of powers animate the Court’s holding in *Boumediene* and its interpretation of the writ of habeas corpus.<sup>58</sup> In one of the concluding paragraphs of Justice Kennedy’s majority opinion, he argues that to allow the political branches to decide in which areas the United States is sovereign and in so doing also allow them to decide when the Constitution should and should not apply would lead to “a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”<sup>59</sup> In that brief passage is summed up eight hundred years of habeas corpus evolution. Echoing from the political war begun after *Darnell’s Case* to the triumph of the 1679 Habeas Corpus Act and finally the incorporation of the writ into the U.S. Constitution, the story of habeas corpus has been the story of the rise of the courts as a coequal branch and a check on the executive. It is a story shared by

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<sup>49</sup> *Boumediene*, 128 S. Ct. at 2251.

<sup>50</sup> McNeal, *supra* note 48, at 30.

<sup>51</sup> *Boumediene*, 128 S. Ct. at 2235.

<sup>52</sup> McNeal, *supra* note 48, at 30 (quoting *Boumediene*, 128 S. Ct. at 2247 (internal quotation marks omitted)).

<sup>53</sup> *Id.* (citing Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-45 (codified as amended at 42 U.S.C. § 2000dd, 10 U.S.C. § 801 & 28 U.S.C. § 2241 (2006))).

<sup>54</sup> *Ex parte Merryman*, 17 F. Cas. 144 (D. Md. 1861).

<sup>55</sup> *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>56</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>57</sup> *Ex parte Merryman*, 17 F. Cas. at 144.

<sup>58</sup> Instead of striking new ground in its separation of powers analysis, in its discussion of sovereignty, the Court in *Boumediene* seems to be more or less in line with its past precedent. For example, in *United Public Workers v. Mitchell*, 330 U.S. 75, 90-91 (1947) the Court held that courts should not become the organ of political theories. In a similar way, the Court in *Boumediene* did not rule on the meaning of sovereignty as it relates to Guantanamo.

<sup>59</sup> *Boumediene*, 128 S. Ct. at 2259 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

England and the United States, which through centuries has proven that even when courts and the Congress occasionally side too blatantly with the executive, as seen in the 1592 Resolution of the Judges or the Fourth Circuit's holding in *Padilla*, such inequitable treatment has been only temporary. After *Padilla*, *Boumediene* was a reaffirmation of the best traditions of the separation of powers and the writ of habeas corpus. As Justice Kennedy wrote, "security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."<sup>60</sup> But even with *Boumediene* and the curtailment of arbitrary detainment by the United States,<sup>61</sup> more must be done to ensure that the writ of liberty is available to those who require it.

### III. *BOUMEDIENE* AND BEYOND: REAFFIRMING HABEAS CORPUS

Despite the success of *Boumediene*, procedural bars on due process continue to threaten the writ of habeas corpus's full application. As stated above, the Constitution of Massachusetts of 1780, which Walker argues best summarizes the traditional American attitude towards habeas corpus, provides that the writ ought to be provided ". . . in the most free, easy, cheap, expeditious, and ample manner."<sup>62</sup> The current U.S. practice of permitting procedural blocks on using habeas corpus does not fulfill this laudatory ambition. This may be illustrated in reference to: (1) the dismissal rates for failure to provide counsel in habeas petitions; and (2) the time and expense now involved with habeas filings. These issues will be addressed in turn.

First, there is evidence that high procedural barriers to post-conviction habeas relief are sapping the great writ of its ability to challenge unlawful or arbitrary detention. In 2004, there were approximately 19,000 non-capital federal habeas corpus petitions filed with over 200 capital federal habeas corpus petitions filed in U.S. district courts—a 100% increase from 1990 levels.<sup>63</sup> From this figure, 63% of issues raised in habeas petitions by state court prisoners were dismissed on procedural grounds at the district court level, while another 35% were dismissed on the merits.<sup>64</sup> When more than two thirds of habeas cases are dismissed on procedural grounds alone, it belies the fact that the full promise of the writ of habeas corpus, as illustrated by the Massachusetts Constitution and before that in the 1679 Habeas Corpus Act, is not being fulfilled. Specifically, the Court's holding in *Wainwright v. Sykes* that a showing of "cause" and "prejudice" is required for a federal habeas

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<sup>60</sup> *Id.*

<sup>61</sup> Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, WASH. POST, Jan. 21, 2009, at A02 (reporting that "In one of its first actions, the Obama administration instructed military prosecutors . . . to seek a 120-day suspension of legal proceedings involving detainees at the naval base at Guantanamo Bay, Cuba—a clear break with the approach of the outgoing Bush administration.").

<sup>62</sup> WALKER, *supra* note 8, at 103-04.

<sup>63</sup> Federal Habeas Corpus Relief: Background, Legislation, and Issues, CRS Report for Congress, at 8 (Feb. 1, 2006), available at [http://assets.opencrs.com/rpts/RL33259\\_20060201.pdf](http://assets.opencrs.com/rpts/RL33259_20060201.pdf) [hereinafter CRS Report].

<sup>64</sup> *Id.*

corpus claim to be permissible is anathema to the purpose of the writ of liberty.<sup>65</sup> As the dissent in *Wainwright* stated, “[p]unishing a lawyer’s unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules.”<sup>66</sup> These procedural bars requiring the grossest incompetence of counsel, as in *Strickland v. Washington*,<sup>67</sup> or a compelling case of actual innocence, as in *Schlup v. Delo*,<sup>68</sup> unduly limit the writ beyond even the standards established in the original 1679 Habeas Corpus Act, which may be seen by the high rates of procedural errors leading to otherwise valid cases being thrown out. In these instances, liberty is being sacrificed in the name of efficiency.

Elaborate procedural barriers are also leading to greatly increased time and expense in habeas petitions, contributing to an alarming drop in the use of the writ post-2004 despite dramatic increases in the prison population.<sup>69</sup> The median time from filing to disposition for state capital federal habeas cases has quintupled from five to twenty-five months since 1990, while it has remained relatively consistent in non-capital cases.<sup>70</sup> Although greater access to legal representation in capital cases is likely partly responsible for some of this aberration, even the delays in non-capital cases are intolerable by historical standards. To illustrate, it took the *Padilla* case four years to reach the typical beginning of a criminal trial<sup>71</sup> as compared to the matter of days required under the 1679 Habeas Corpus Act.<sup>72</sup> Such significant delays increase the costs of post-conviction relief both in time and money and are abhorrent to the “free, easy, cheap, expeditious, and ample”<sup>73</sup> standard for habeas relief envisioned in the Constitution of Massachusetts as passed down by centuries of English legal development.

Walker concludes *Habeas Corpus Writ of Liberty* by evoking George Santayana, who famously stated that “those who cannot remember the past are condemned to repeat it.” The history of the evolution of the writ of liberty clearly has lessons that should define today’s debates surrounding the imminent closure of Guantanamo but continuation of arbitrary detention in many parts of the world. One example of such a practice is visible in Peru, whose system of military tribunals has arbitrarily detained thousands of individuals, often in violation of double jeopardy that England outlawed in 1679.<sup>74</sup> Although both England and the United States have shown a

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<sup>65</sup> *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

<sup>66</sup> *Id.* at 113.

<sup>67</sup> *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

<sup>68</sup> *Schlup v. Delo*, 513 U.S. 298, 326-29 (1995).

<sup>69</sup> CRS Report, *supra* note 63, at 10.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> WALKER, *supra* note 8, at 134.

<sup>72</sup> *Id.* at 83.

<sup>73</sup> *Id.* at 103-04.

<sup>74</sup> These military tribunals have been ongoing since 1989. See James Brooke, *Peru’s President Calls for Military Trials for Rebels*, N.Y. TIMES, July 29, 1989. One example of these detainees is Dr. Luis Williams Pollo Rivera, who is a Peruvian physician specializing in

remarkable ability to roll back executive power when it threatens the separation of powers, as seen in *Boumediene*, citizens of either country cannot rest on their laurels. Habeas corpus is itself not a natural right, despite being argued so by Thomas Jefferson.<sup>75</sup> Rather, it is a writ required to defend personal liberty upon which a free society is founded. In order to realize its full potential, procedural reform must be enacted along the lines of the dissent in *Wainwright*, and more specifically, a new requirement must be included in state criminal codes and through congressional statutes mandating that all criminals seeking habeas review beyond capital offenders should have a right to assistance of counsel. Assistance of counsel has been shown to increase habeas success rates in some instances by a factor of more than twenty.<sup>76</sup> Such a reform would help ensure that Cicero's maxim "inter arma enim silent leges" (in time of war the law falls silent) never rings true in England, the United States, or any other society again.

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trauma and orthopedics who worked at Essalud Hospital in Lima, Peru, where he was arrested, acquitted by the Peruvian Supreme Court, and then rearrested for the same charges and found guilty through the military tribunal system. The fact that he was not allowed to have witnesses or cross-examine his accusers, or seek post-conviction relief, demonstrates the critical role that habeas corpus can play in the administration of justice. See *Rivera v. Peru*, Case 156, Inter-Am. C.H.R., Report No. 42/07, available at <http://www.cidh.oas.org/annualrep/2007eng/Peru156.05eng.htm> (last visited Sept. 28, 2009).

<sup>75</sup> WALKER, *supra* note 8, at 137.

<sup>76</sup> CRS Report, *supra* note 63.