

Federal Habeas Corpus

Cases and Materials

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Lyon, Andrea D.

Federal habeas corpus : cases and materials / by Andrea Lyon, Emily Hughes,
Mary Prosser.

p. cm.

Includes bibliographical references and index.

ISBN 0-89089-586-4

1. Habeas corpus--United States. I. Hughes, Emily. II. Prosser, Mary. III. Title.

KF9011.L96 2004

347.73'5--dc22

2004007867

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*We dedicate this book to
Arnold and John,
to our children,
Will, Samantha, Molly, Hannah, and Ella,
and to the many colleagues and clients who have
generously shared their knowledge and their stories with us.*

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Foreword

Why Is Habeas Corpus Important?

By John C. Tucker

“Would you write a short introduction for our casebook about why habeas corpus is important?” Professor Lyon asked. “I’d be glad to,” I said.

The problem, I soon realized, is how to write anything short about something as fundamental to our legal system as habeas corpus—the law which Blackstone described as “the stable bulwark of our liberties,” and which American courts commonly refer to as simply “The Great Writ.”

In talking about habeas corpus we can’t avoid starting nearly 800 years ago at Runnymede, with the most famous provision of Magna Carta: “No freeman shall be taken or imprisoned except by the lawful judgement of his peers or by the law of the land.” Magna Carta Art. 39 (1215). For the next 467 years, English kings periodically ignored that stricture and imprisoned their subjects without due process of law, while English parliaments passed laws designed to prevent it—laws referred to by the Latin phrase “habeas corpus”—loosely, “you have the person, now show a legal justification for keeping him or let him go.” Finally, the Habeas Corpus Act of 1679 (the statute Blackstone was talking about) pretty much settled the matter. Unless parliament passed a law temporarily suspending habeas, no citizen of England could be imprisoned without a formal charge and an opportunity to contest it.

Given the importance of habeas corpus as a check on the power of the English monarch, it is not surprising that the American colonists also saw it as their most important guarantee of due process, and were enraged when royal authorities sometimes refused to afford its protections to colonists who challenged their arbitrary conduct. Thus, in Federalist 84, Alexander Hamilton declared that habeas corpus was “the bulwark of the British Constitution” and essential to the protection of liberty in the new nation. Habeas corpus became the only English common-law process explicitly written into our own Constitution, and jurisdiction to enforce the Great Writ was granted to American courts in the first Judiciary Act in 1789, even before the adoption of the Bill of Rights.

From that time forward, the Great Writ has been seen as a cornerstone of American justice. As the Supreme Court declared in *Fay v. Noia*, “there is no higher duty than to maintain it unimpaired.”

It was *Gideon v. Wainwright*, another habeas case, which, with the book and movie *Gideon's Trumpet*, became the most famous of the decisions which marked the Warren Court's post World War II effort to extend the protections of the United States Constitution to criminal defendants whose due process rights had previously been left to the less-than-rigorous care of state courts. And while many important cases of that era were decided on direct appeal from state supreme courts, the protections established by cases like *Griffin v. Illinois* (free transcript), *Mapp v. Ohio* (exclusionary rule), *Brady v. Maryland* (exculpatory evidence), *Miranda v. Arizona* (warning of rights) and *Malloy v. Hogan* (Fifth Amendment) were initially most often vindicated by a federal petition for writ of habeas corpus.

If you really want to understand why habeas corpus is so important, the people to talk to are the thousands of criminal defendants who have found themselves convicted and imprisoned in state penitentiaries—sometimes on death row—because of ineffective assistance of counsel, or the concealment of exculpatory evidence, or a confession obtained by artifice or coercion. In the roughly two decades following reinstatement of the death penalty in America, nearly 50% of the cases in which a verdict and sentence of death was imposed and approved by the state courts were set aside in federal court by petition for writ of habeas corpus. And while it is probably impossible to give definitive numbers, there is no question that a majority of the 114 men and women who have been released from death row as a result, in part, of the development of DNA testing which proved them innocent, would have died had their executions not been delayed by operation of the Great Writ. Sometimes a life was saved by a finding that the original verdict or sentence was constitutionally defective, sometimes it was delay alone that saved an innocent life until DNA testing was perfected. Such a result would only be decried by the posturing politicians who in recent years have sought to weaken the protections of habeas corpus as a way of demonstrating their supposed “toughness on crime.” The founding fathers—who such politicians shamelessly invoke at every opportunity—would weep.

As lawyers who will handle criminal cases, whether as a significant element of your practice or simply to fulfill your obligation to the profession by accepting appointed cases at the trial or post-trial levels, an understanding of the law of habeas corpus is as essential as anything the users of this book will learn in law school. Indeed, with the increasingly restrictive and complex procedural requirements which have been imposed on the exercise of the writ in recent years by legislators and the Rehnquist Court, an understanding of the intricacies of habeas corpus law is more important than ever, lest the protections of the Great Writ be lost to a client by ignorance or inadvertence.

Finally, we cannot ignore the frontal assault on the writ which our current royalty has mounted in the name of national security and the “war on terror.” As I write, the detainee cases are awaiting decision in the Supreme Court. By the time you read this introduction they will have been decided. If the Court rules for the Government, non-citizens may no longer have access to the protections of the writ at all, even when held on American-controlled soil. Even citizens, if arbitrarily designated “enemy combatants,” may see the protections of the Great Writ fade like the grin of the Cheshire Cat, until nothing of practical importance remains.

In these times, the ghosts of Runnymede are not grinning, and protection of the Great Writ has never been more important. Whatever is decided in the detainee cases, for ordinary citizens, the Great Writ must remain as a bulwark of our liberties, the ultimate vehicle for protecting our Constitutional rights against the power of government.

A lawyer who does not know how to preserve the rights guaranteed by the Writ and to invoke them for her clients is not fully educated in the law.

John Tucker is a lawyer and the author of MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT and TRIAL AND ERROR: THE EDUCATION OF A COURTROOM LAWYER.

Preface

The three of us are deeply concerned about issues reflected in recent statutory and doctrinal changes in the “Great Writ.” We undertook this book in hopes of helping students understand and critically examine the political, legal, and pragmatic effects of the role of habeas corpus in our criminal justice system. At the same time, we hope this book may also be useful to attorneys who wish to familiarize themselves with habeas corpus jurisprudence. While we have tried to fairly present the competing concerns that inform this complex and evocative area of the law, because we are defense attorneys, our experiences representing individual—rather than governmental—interests have undoubtedly shaped our personal perspectives. As we finished reading each case, we would often wonder what happened to the person behind the case, the person whose life and liberty the Court’s decision most immediately affected. Many of the cases are thus followed by a brief synopsis of what happened to the defendant after the case was over.

We want to acknowledge the support and assistance our schools provided us while writing this book: the DePaul University College of Law and Dean Glen Weissenberger, as well as the University of Wisconsin Law School and Dean Kenneth B. Davis, Jr. We also acknowledge the important work of Professors James Liebman, Randy Hertz, and Larry Yackle, whose treatises, articles, books, and research continue to be both groundbreaking and foundational. In addition, we sincerely thank Professors Susan Bandes, Walter J. Dickey, Samuel R. Gross, James Liebman, and Marc Weber, as well as Grant Sovern, for their insightful comments and suggestions. A number of current and former law students also assisted us with various phases of the book, including Julie Darr, Erin Hairoupoulos, Byron Lichstein, and Maryam Toghraee. And finally, we extend a special thanks to our proofreader, Susan Burgess, for her patience and diligence.

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