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Don't Suspend Habeas Corpus

John J. Connolly (op-ed)

Baltimore Sun

November 22, 2005

My law firm represents an orthopedic surgeon who has been incarcerated for four years. Our client has never been charged with a crime. He has never had a trial. He is not permitted access to a telephone, Internet, or e-mail. He is permitted no visitors. He is shackled, transported and interrogated according to shifting policies of government agencies too numerous to mention. He has only one meaningful right: habeas corpus.

The Senate voted to curtail that right in a last-minute amendment to a defense appropriations bill.

A writ of habeas corpus is a court order requiring proof that a person in custody is lawfully detained. "The Privilege of the Writ of Habeas Corpus shall not be suspended," says the Constitution.

Habeas corpus is one of the few civil rights enshrined in the original text of the Constitution; it is older than the Bill of Rights, and much older than the nation itself. For hundreds of years, the "privilege of the writ" has served as a critical restraint on unlawful detention by the executive branch of government, whether the executive is governor, president or king.

But the Constitution has an exception allowing suspension of habeas "when in Cases of Rebellion or Invasion the public Safety may require it." Suspensions of habeas corpus are very rare and often regrettable in the long run. One of the great tests of habeas corpus arose in Maryland in 1861, when Baltimore County farmer John Merryman was arrested by military order and imprisoned at Fort McHenry, "upon general charges of treason and rebellion, without proof."

The commanding general of the prison refused to obey a judicial writ of habeas corpus on the ground that President Lincoln had authorized him to suspend it. Chief Justice Roger B. Taney, sitting as a circuit justice in Baltimore, held that the president had grossly exceeded his power by stripping the courts of the right to question executive detention.

Lincoln later argued that the existence of the Union depended on quelling unrest in border states like Maryland, and habeas corpus would obstruct that goal. Yet the judgment of history, in this one instance, tends to favor Justice Taney, at least as to the question whether the president had authority to suspend habeas.

Congress, which does have authority to suspend habeas, ratified Lincoln's order in 1863. The unavailability of habeas corpus during the Civil War was a bitter experience for Marylanders, and when they gathered in 1867 to form a new state constitution, they left nothing to chance. Even today, the Maryland constitution provides that "The General Assembly shall pass no Law suspending the privilege of the Writ of habeas corpus." Period.

Unfortunately, our firm's client, who shall remain anonymous, is not a Baltimore County farmer and he is not incarcerated by the state of Maryland. He is a citizen of Yemen, and he is incarcerated by the U.S. military at Guantanamo Bay, Cuba.

The government claims he is an "enemy combatant" and that it may incarcerate him as long as it pleases - possibly for life - without trial. We contend that he is an altruistic physician who never harmed the United States and even today bears it no malice. We have filed a petition for a writ of habeas corpus asking the government to show that it has a lawful basis to keep him in prison.

Guantanamo detainees have raised legitimate challenges to their classification as enemy combatants. No detainee wore an enemy uniform and very few were seized in an act of war. Instead, the government often relies on hearsay claims that a given detainee associated with members of al-Qaida or the Taliban. Long experience has taught the judicial branch that evidence of this nature is unreliable. And the government has acknowledged, under pressure of court review, that many detainees are not enemy combatants.

Suspension of habeas corpus should occur only in the most urgent circumstances, and never when the civilian courts can function consistent with public safety. Nothing about the present war warrants Congress's extraordinary attempt to restrict habeas corpus for a few detainees incarcerated on a remote military base.

Washington is not surrounded by a sovereign state of questioned allegiance to the Union, as Lincoln feared during the Civil War. The federal courts are open and functioning, and they are not prone to releasing enemy combatants, much less terrorists, if the evidence suggests a reasonable basis for their detention.

The Civil War, unlike the war on terrorism, had a definite end. John Merryman was released and later served as treasurer of Maryland and a member of the House of Delegates. Our client, already incarcerated longer than the Civil War, waits for a day in court that may never come.

John J. Connolly is a partner in a Baltimore law firm. His e-mail is jconnolly@murphyshaffer.com.