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IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v. Case No. 04cv02022-PLF

Hon. GEORGE W. BUSH,

et al.,

Respondents.

PETITIONER'S NOTICE OF THE UNCONSTITUTIONALITY OF THE ATTEMPTED SUSPENSION OF HABEAS CORPUS IN THE MILITARY COMMISSIONS ACT OF 2006

Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) held that aliens detained at the U.S. Naval Base at Guantanamo Bay, Cuba, had adequately alleged that they were kept as prisoners " '. . . in violation of the Constitution or laws or treaties of the United States.' 28 U. S. C. §2241(c)(3)", *Rasul,* 124 S. Ct. 2686, 2698, footnote 15. More importantly, the Court also held that the prisoners had adequately alleged that they were detained by order of executive officials located in the District of Columbia. The

Court therefore remanded their cases to the District of Columbia "for the District Court to consider in the first instance the merits of petitioners' claims." *Rasul, id.*, 2699, conclusion. Relying on this decision, Saifullah Paracha, a citizen of Pakistan once admitted to the U.S. as a lawful permanent resident, and seized while on a business trip to Bangkok, filed a petition for habeas corpus in the U.S. District Court in D.C.

Now Congress has passed the Military Commissions Act of 2006, S. 3930, which the President signed October 17, 2006, P.L. 109-366. Section 7 of that act purports to suspend habeas corpus in certain cases. The suspension applies not just to the alien prisoners at Guantanamo but for all non-citizens, including lawful permanent residents, anywhere within the reach of the United States, including the District of Columbia and the fifty states:

> Section 7 - Habeas Corpus Matters.
>
> (a) In General- Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):
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> `(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
> `(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.'.
>
> (b) Effective Date- The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

This is invalid under the Suspension Clause of the Constitution, Article I, section 9, clause 2: "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." This attempt to shut off habeas corpus inquiry for those held in indefinite executive detention is void, and Paracha's petition must proceed to judgment.

I. NOTHING SAVES SECTION 7 OF THE MILITARY COMMISSIONS ACT OF 2006 FROM INVALIDITY UNDER THE SUSPENSION CLAUSE, ATICLE I, Sec. 9, Clause 2, OF THE U.S. CONSTITUTION.

a. The political branches have found that there is no rebellion or invasion, and the courts are bound by that finding, which renders suspension unconstitutional.

Suspension of habeas corpus is not an ordinary legislative or executive act. It is an act that requires a fact to make it constitutional, the fact of a "rebellion or invasion." The Military Commissions Act of 2006, by conspicuous silence, commits Congress to the factual finding that there is no rebellion or invasion in the United States at this time, a finding of indisputable accuracy. The courts must respect that finding and must hold that the suspension of habeas corpus is therefore not allowed by the Suspension Clause.

A requirement for rebellion or invasion is not the same as a requirement for war. The choice of the words "in cases of rebellion or invasion", rather than "in time of war," was a deliberate choice to limit suspensions to crises on American soil. The Founders had no intention of allowing suspension whenever the nation might be engaged in war -- conventional or unconventional, real or metaphorical. They required "rebellion or invasion".

Throughout American history, authorities imposing suspensions have been scrupulous in reciting their factual findings that a rebellion or invasion was under way.

The first American suspension was an order from President Abraham Lincoln to Winfield Scott, the Commanding General of the Army of the United States, April 27, 1861. It began:

> You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ. [1]/

Lincoln to Scott, April 27, 1861, 6 *A Compilation of the Messages and Papers of the Presidents 1789-1897,* James D. Richardson (Washington: GPO, 1897) 18**.**

In *Ex parte Merryman*, 17 Fed. Cas. 144 (Cir. Ct., D. Md., 1861), Chief Justice Taney declared that the President could not suspend habeas corpus without Congressional authority, and he apparently had not even seen these orders. But Lincoln had been careful to find and explicitly cite the fact of the insurrection, however obvious it may have been at the time.

Lincoln's subsequent suspension decrees contained the same findings. On May 10, 1861, he authorized the commander of the forces of the United States on the Florida Coast to suspend the writ if necessary. He began:

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[1]/ When Scott passed this order on to his subordinates he altered the language slightly and changed "between the city of Philadelphia and the city of Washington" to "between the city of Philadelphia via Perryville, Annapolis City and Annapolis Junction". *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington: GPO, 1880-1900; Gettysburg: National Historical Society, 1972), Series I, v. 51, part I, supplement, 337.

> Whereas an insurrection exists in the State of Florida, by which the lives, liberty and property of loyal citizens of the United States are endangered; . . .
>
> Proclamation of May 10, 1861, 12 Stat. 1260-1261.

Further presidential suspensions followed. On July 2, 1861, Lincoln extended the supply line protected by suspension to include Washington to New York. He repeated the language, "You are engaged in repressing an insurrection . . . ". *The War of the Rebellion*, Series I, v. 51, part I, supplement, 409, 6 *Messages and Papers* 19.

On August 16, 1861, Lincoln issued a general proclamation that the southern states were in "insurrection", 12 Stat. 1262, 6 *Messages and Papers* 37-38, but this did not obviate the need for such a finding in subsequent habeas suspensions. On October 14, 1861, he extended the protected line from Washington all the way to Bangor, Maine, and called it "The military line of the United States for the suppression of the insurrection." 6 *Messages and Papers* 39. On December 2, 1861, Lincoln wrote General Halleck, Commanding the Department of Missouri:

> General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the writ of *habeas corpus* within the limits of the military division under your command . . .
>
> 6 *Messages and Papers* 99.

Lincoln's proclamation of September 24, 1862, to suppress the draft riots in New York and other northern cities, recited that all rebels and insurgents, and anyone interfering with the draft, would be subject to court-martial "during the existing insurrection and as a necessary measure for suppressing the same . . .". Habeas corpus was suspended "in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned [by military authorities] . . . " 13 Stat. 730.

On March 3,1863, Congress finally agreed to lend its authority to Lincoln's executive suspensions. Like the executive, the legislative branch was careful to recite the constitutional facts prerequisite to suspension:

> . . . during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. . . . [and military officers may hold prisoners] so long as said suspension by the President shall remain in force, and said rebellion continue.
>
> 12 Stat. 755-758, March 3, 1863.

The country was involved in its most obvious crisis ever, before or since, but still the rebellion was a fact that had to be recited by the law.

The statutory finding did not end the necessity for the recitation. On September 15, 1863, Lincoln suspended the writ "throughout the United States . . . throughout the duration of the said rebellion . . . ", but only after declaring:

> Whereas, the Constitution of the United States has ordained that 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; and whereas, a rebellion was existing on the third day of March, 1863, which rebellion is still existing; and whereas, by a statute which was approved on that day, it was enacted by the Senate and House of Representatives of the United States, in congress assembled, that during the present insurrection, the President of the United States, whenever in his judgment the public safety may require it, is authorized the suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof; . . .
>
> September 15, 1863, 13 Stat. 734.

And on July 5, 1864, extending the suspension into Kentucky, Lincoln pointed to the statute and found, " . . . the said insurrection and rebellion still continue, endangering the existence of the constitution and government of the United States;" 13 Stat. 742. Likewise, in his General Orders, No. 233, of July 19, 1864, also suspending for Kentucky,

he said the same thing (with immaterial variations). *War of the Rebellion,* Series I, v. 39, part II, 180.

The Confederate "Act to suspend the privilege of the writ of habeas corpus in certain cases," under a constitution with a Suspension Clause identical to ours, recited that the president had "informed Congress of conditions of public danger which render the suspension of the writ a measure proper for the public defence [sic], against invasion and insurrection". February 15, 1864, *War of the Rebellion,* Series IV, v. 3, 203. Even so, the Georgia legislature protested the suspension, and argued that the Due Process Clause of Fifth Amendment, being later than the Suspension Clause, repealed or overrode it. March 19, 1864, *War of the Rebellion,* Series IV, v. 3, 234-235.

After the formal surrender of the Confederate forces, resistance and disorder continued or broke out in many places, so Congress again authorized suspension. The statute of April 20, 1871, continued to comply with the constitutional need for explicit findings. It described the unlawful conspiracies and combinations that were intimidating the freedmen from the exercise of their new rights, and provided:

> . . . in every case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown;
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> 17 Stat. 13, 14-15, April 20, 1871.

When President Grant found it necessary to use this authority, he declared:

> . . . whereas such unlawful combinations and conspiracies for the purposes aforesaid are declared by the act of Congress aforesaid to be rebellion against the Government of the United States;

> . . . do hereby suspend the privileges of the writ of habeas corpus within the counties of Spartansburg [sic], York, Marion [etc., etc.] . . . during the continuance of such rebellion.
>
> 17 Stat. 951-952, October 17, 1871.

Likewise, when extending the suspension into Union County, 17 Stat. 953-954, November 10, 1871.

The writ was suspended in the Philippines during the insurgency there after the U.S. took the islands over from Spain. This was under authority of the act for the governance of the Philippines, 32 Stat. 691, 692, July 1, 1902, which was more explicit than the U.S. Constitution in allocating authority to suspend, but used similar language requiring "rebellion, insurrection, or invasion". The Civil Governor and the Philippine Commission were punctilious in reciting their findings of disorder: "Whereas these bands [of 'ladrones'] . . . . are in open insurrection against the constituted authorities . . . ", *Fisher on behalf of Barcelon v. Baker*, 203 U.S. 174, 179-180, 27 S. Ct. 135, 51 L. Ed. 142 (1906).

In Hawaii, the Governor of the Territory suspended the writ on December 7, 1941, immediately after the Japanese raid. He acted under section 67 of the Organic Act, which echoed the terms of the suspension clause in the U.S. Constitution. He proclaimed:

> Whereas, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian islands; and . . .
>
> Whereas, the public safety requires . . .
>
> I do hereby suspend the privilege of the writ of habeas corpus until further notice.
>
> Proclamation December 7, 1941, *Ex parte White*, 66 F. Supp. 982, 989 (Hawaii, 1944).

The attack was as notorious as such an event can be, but still the Governor felt it necessary to recite the fact in the proclamation.

In response to the supposed Burr conspiracy, the Senate passed a bill to suspend habeas corpus for a mere three months, 16 Annals of Congress 44, January 23, 1807. The text is at 16 Annals of Congress 402. The bill was a one-sentence declaration of suspension, with no reasons given and no finding of insurrection -- largely because the rebellion, if there had been any, had already been suppressed. The House rejected the suspension bill by a resounding vote of 113 to 19. 16 Annals of Congress 424-425, January 26, 1807. The failure to find a justifying rebellion or invasion was central to the reason for rejecting the suspension bill. (Remarks of Mr. Burwell, 16 Annals of Congress 403-404.)

This brief historical review shows how reluctant Americans have been to suspend the writ, and how grave the disorder must be before we will contemplate doing so. There was no suspension of habeas corpus during the Whiskey Rebellion, which recent scholarship has shown to have been a serious threat to the new republic, [2]/ and none during the era that produced the Alien and Sedition Acts. No suspension was called for during the War of 1812, although American territory was actually invaded at Washington, New Orleans, and elsewhere. The reluctance to suspend the writ continued throughout the twentieth century. Despite the landing of saboteurs on the Atlantic coast and the fear of invasion on the west coast, there was no mainland suspension of the writ during World War II. Eisenhower did not ask for suspension of the writ during the desegregation crisis

[2]/ Thomas P. Slaughter, *The Whiskey Rebellion* (New York: Oxford University Press, 1986); William Hogeland, *The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels who Challenged America's Newfound Sovereignty* (New York: Scribners, 2005).

at Little Rock, perhaps because he rightly appreciated habeas corpus as a core feature of Americanism:

> [An American] can walk upright and meet his friend--or his enemy; and he does not fear that because that enemy may be in a position of great power that he can be suddenly thrown in jail to rot there without charges and with no recourse to justice. We have the habeas corpus act, and we respect it.
>
> Remarks to B'nai B'rith, November 23, 1953. [3]/

Nor has suspension been seriously proposed by anyone else in the last half century, despite various desegregation riots, the 1968 disturbances, Watts, and many other breakdowns of public order.

The few precedents for suspension have been set out at length because they show so clearly that suspension is not an ordinary legislative or executive act. It is an act that requires certain facts to make it constitutional. Had Congress recited the existence of a rebellion or invasion -- perhaps invoking the "invasion" of undocumented workers, or the outrages of five years ago [4]/ -- the courts would be obliged to review that finding and, with all due deference, set it aside. The Suspension Clause is a clear mandate in the Constitution, and it is the duty of the courts "to decide whether the exigency demanded by the constitution exists to sanction the act." *In re Barry*, 42 Fed. 113, 122 (Cir. Ct., S.D.N.Y., May 25, 1844), reprinted at 136 U.S. 597, 610 (1890).

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[3]/ Quoted in *Jay v. Boyd*, 351 U.S. 345, 374, footnote 1, Douglas, J., dissenting (1956) and shown as a film clip in the recent movie *GoodNight, And Good Luck.* The full text is at http://eisenhower.archives.gov/avwebsite/PDF/53text.pdf, 1953 Addresses of President Dwight D. Eisenhower, pages 319-321.

[4] / Amanda J. Tyler, "Is Suspension a Political Question?" 58 or 59 Stanford Law Review (November 2006) 100, 119, forthcoming, will consider these possibilities, and conclude that the courts would have a duty to review such findings.

But we are spared the need for any such review. Congress found neither a rebellion nor an invasion because neither exists. This suspension is unconstitutional.

b. The MCA makes no provision for restoring the writ, as the Constitution demands, when the public safety will no longer require its suspension.

A review of the above suspension decrees and statutes also shows a healthy respect for the other phrase in the Suspension Clause, "when . . . the public Safety may require it". Thus there has never been a legislative suspension, only a delegation by the Congress of the power to suspend habeas corpus if, and as long as, the executive finds it necessary. Indeed, most of the above suspension decrees further delegate the power to some officer on the scene, thus insuring further flexibility, and insuring that the writ will be restored as soon as the public safety allows. The MCA, on the other hand, suspends habeas corpus for aliens regardless of any executive judgment about the necessity. That, and the absence of any legislative finding that the public safety requires it, makes the suspension improper under our Constitution.

c. This challenge to indefinite executive detention is squarely within the classical scope of habeas corpus as it was known in 1789.

Paracha's petition for habeas corpus is a challenge to executive detention, and therefore squarely within the 1789 scope of the writ. "A doctrine that allowed transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention. [Citations omitted.]" *Swain v. Pressley,* 430 U.S. 372, at 386, 97 S. Ct. 1224, 51 L. Ed. 2d 411, at 423, Burger, C.J., concurring. "At the time the privilege of the writ was

written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution." *Fay v. Noia,* 372 U.S. 391, at 426, 83 S. Ct. 822, 9 L. Ed. 2d 837, 861 (1963). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest. [Footnote omitted.]" *INS v. St. Cyr,* 533 U.S. 289, 301, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001).

There was not a court or convention or assembly in America, or in England either, which would have doubted in 1789 that Paracha's petition was allowable as a petition for the writ of habeas corpus. He is a citizen of a friendly country, he was admitted to permanent residency in the United States, he has carried on extensive business with an American partner, and he has been imprisoned without trial for over three years by an executive decree. Any court in any American colony would have inquired into his detention, and would have called the inquiry a habeas corpus.

And if exact precedents are desired, they abound. The Court's opinion in *Rasul, supra,* footnotes 11, 12, and 13, lists many of them. *St. Cyr, supra,* collects even more, in footnotes 16 through 23, 533 U.S., 301-303. E.g., *Somerset v. Steward,* 24 Eng. Rep. 499, Lofft 1, 20 How. St. Trs. 1, 79-82 (1772) freed on habeas corpus a slave from Virginia with the most tenuous connection to England. He had been brought to England temporarily and was being held on a ship bound to Jamaica. Neither his alienage nor his servitude were any bar to the writ. *Ex parte D'Olivera,* 7 Fed. Cas. 853, 1 Gall. 474 (C. Ct., D. Mass., 1813), released several aliens from confinement under charges they had deserted

their ship. There was no discussion whether the aliens had the privilege of habeas corpus, as it was clear that they did.

The Habeas Corpus Act of 1679 forbids taking people out of the realm to avoid the writ. This Act is as relevant to the Founders' understanding of habeas corpus as is the case law, because the D.C. reception statute, 45 D.C. Code 401(a) accepts "all British statutes in force in Maryland on February 27, 1801," and the Maryland Declaration of Rights, Art. 5, accepted "such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six," if applicable.

In *Ex parte Anderson*, 121 Eng. Rep. 525 (K.B., 1861), although after the era in question, the Court of King's Bench collects and cites many cases of the writ of habeas corpus running to the far reaches of the empire, such as St. Helena, and Calais when it was under conquest. There an escaped slave was freed from the threat of extradition back to Missouri, and the writ ran from King's Bench in London to where Anderson was held in Upper Canada.

Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) did not expand habeas corpus by reaching prisoners held under authorities previously exempt from federal inquiry, nor did it reach issues previously outside the scope of the writ. *Rasul* was a geographical ruling, holding only that the U.S. Naval Base at Guantanamo is under sufficient American control to confer habeas standing on someone held as a prisoner there. Treating *Rasul* as an extension not protected by the Suspension Clause would make that Clause meaningless in most of the country. The Louisiana Territory, Texas, California, and the southwest are all post-1789 acquisitions. If a challenge to executive detention at

Guantanamo is not protected by the Suspension Clause, then neither would be petitions from Alaska, Hawaii, and most of the continental United States.

d. The Suspension Clause does not freeze habeas corpus to its 1789 precedents, but protects a vital and flexible writ that the Founders saw as essential.

The Founders consistently referred to habeas corpus as the great protection for the most fundamental of liberties, freedom from arbitrary confinement, so when they guaranteed it against suspension they were not referring to the limited class of specific precedents already on the books, they meant to guarantee the writ itself, however it might grow or modify over the years. The Suspension Clause prevents the repeal of any protection which has been sanctified with the label "habeas corpus", or at least those provisions necessary to protect individuals from arbitrary detention. Perhaps not every modern procedural detail of the writ is protected (cf. *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 125 L. Ed. 2d 827 (1996) allowing modifications to the rules governing res judicata and the splitting of claims), but when it comes to essentials the Suspension Clause does provide a ratcheting of rights, so the legislature cannot take away protections previously granted or earned, if they are central to the Great Writ. History shows this is exactly what the Founders intended, not merely the freezing of whatever law they had in 1789.

The phrase "habeas corpus" has been used in many writs over the centuries. (Originally, it may have been more associated with arresting people than with setting them free. R. J. Sharpe, *The Law of Habeas Corpus* (Oxford: Clarendon Press, 1976) 2.) By the late seventeenth century, habeas corpus had played enough of a role in the struggle against

Stuart absolutism that Parliament strengthened and guaranteed it by several statutes, most notably the Habeas Corpus Act of 1679, 31 Car II, c. 2. These statutes did not create the writ, which was well-established by judge-made common law. "[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law." Marshall, C.J., *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 93-94 (1807). The statutes guarded against delay and other obstacles to the writ's effective use. William F. Drucker, *A Constitutional History of Habeas Corpus* (Westport, Connecticut: Greenwood, 1980), ch. 1, "English Origins of the Writ of Habeas Corpus", 12-94.

The writ appears in America as early as the 1680s, and in 1706 Judge Samuel Sewall entertained an application. *Sketches of the Judicial History of Massachusetts,* Emory Washburn (Boston: Little, Brown, 1840) 152 and 195-96; *American Habeas Corpus: Law, History and Politics,* Badsha K. Mian (San Francisco: Cosmos of Humanists Press, 1984), 51-70. The English experience impressed the American colonists with the value of the writ as a safeguard against oppression. E.g., *Bushell's Case,* 124 Eng. Rep. 1006, Vaughan 135 (Common Pleas, 1670), where the writ was used to free the jurors who refused to convict William Penn of unlawful assembly. Blackstone called the Habeas Corpus Act of 1679, "that second *magna carta*, and stable bulwark of our liberties", I Blackstone's Commentaries 137, and "the most celebrated writ in the English law", III Blackstone's Commentaries 129-138. Blackstone's American annotator, St. George Tucker, was equally enthusiastic. See his Appendix to Volume First, Part First, 290-292, of his *Edition of Blackstone's Commentaries,* by St. George Tucker (Philadelphia: Birch & Small, 1803; reprint, New York: Augustus Kelley, 1969).

Since the writ rested on a combination of judge-made precedents and statutory guarantees, it was as flexible as it was valued. Tucker says it would take the "talents of an Alfred to harmonize and digest into one system" the status of the common law in each of the colonies at the time of the Revolution. *Id.*, 405. Drucker, ***supra,*** ch. 2, "The British Colonies in North America: Extension of the Writ of Habeas Corpus", 95-125, makes some attempt. But there was no authoritative "Restatement of Habeas Corpus" available to the Founders. They did not use the phrases "the writ of habeas corpus" in any precise, technical, or limited sense, they used it to denote the whole genus or family of judicial inquiries into oppressive confinement. It would be the grossest distortion of history through modern lenses to suggest that any of them could have though the clause "The privilege of the writ of habeas corpus shall not be suspended" meant only "you are guaranteed the writ if you can find a pre-1789 precedent squarely fitting the particular abuse you may be protesting." And if anyone had meant to limit the guarantee that way, no one could have spelled out what was covered and what was not. The task would be no easier after the passage of two centuries, and "reconstructing habeas corpus law . . . . [for purposes of a Suspension Clause analysis] would be a difficult enterprise . . . ". Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens", 98 Columbia L. Rev. 961, 980 (1998), quoted with approval in ***St. Cyr, supra,*** at footnote 13.

But some minority opinions in recent Supreme Court opinions tell us to look to the law as it stood at the adoption of the Constitution, and to protect from suspension only the "privilege of the writ of habeas corpus" as it then existed. This interpretation has been put forth in response to the expansion of the writ to look behind criminal judgments, even those of courts of competent jurisdiction. This interpretation has never been the sole basis

of a solid holding. Chief Justice Burger advanced the theory in a concurring opinion in *Swain v. Pressley*, 430 U.S. 372, 384-386, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977), with support of two other justices, and his focus on the finality of criminal judgments was clear. But the Court implicitly rejected his interpretation by deciding the case on the more difficult ground of finding the substituted procedures adequate. In *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 125 L. Ed. 2d 827 (1996), the Court unanimously upheld recent enactments that sharply limited second and subsequent habeas challenges to criminal convictions. Chief Justice Rehnquist discussed the expansion of federal habeas corpus since colonial times, first to reach state prisoners and then to reach behind judgments of conviction. But instead of limiting the Suspension Clause to protect only the older uses of the writ, he wrote, "[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Felker v. Turpin*, 518 U.S. 651 (1996), at 663-664. This concession was presumably necessary to get the whole Court (seven of whom are still sitting) to join in this opinion.

Thus the demonstration above that Paracha's petition would have been good in 1789 is not necessary. Petitions such as his were good in 2004 when *Rasul* was decided, and the privilege of filing them may not be suspended.

e. Far from providing an adequate and effective alternative to habeas corpus, the new act will leave many prisoners with no remedy, and the alternative remedy available to some is grossly inadequate.

Swain v. Pressley, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977), allowed denial of habeas corpus to D.C. prisoners because they were given an adequate alternative procedure, a motion in D.C. Superior Court, in which to raise their challenges. "[T]he

substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.*, 430 U.S., 381.

Here, the alternative remedy in the D. C. Circuit is both inadequate and ineffective as a substitute for habeas corpus in many ways, as Paracha's own case shows dramatically.

Paracha has at least been able to file a petition in the D.C. Circuit, for all the good it has done him, but many prisoners will not have even that alternative. The habeas suspension section denies habeas to any alien, "who has been determined by the United States to have been properly detained as an enemy combatant *or is awaiting such determination*" (new 28 USC 2241(e), emphasis added). The alternative remedy is in the Detainee Treatment Act of 2005 [5]/ which provides that the D.C. Circuit shall have "exclusive jurisdiction to determine the validity of any *final* decision of a *Combatant Status Review Tribunal* that an alien is properly detained as an enemy combatant." (DTA 1005(e)(2), emphasis added.) Thus under the best of circumstances there is going to be a gap of months or years between the habeas suspension and the attachment of the D.C. Circuit's jurisdiction.

There are two permanent gaps, moreover. A prisoner may be labeled an enemy combatant "by the United States" but by some authority other than a Combatant Status Review Tribunal (CSRT). CSRTs have operated only since July 2004 and only at Guantanamo. Nowhere is there any guarantee that a supposed enemy combatant will be

[5] / On December 30, 2005, the President signed into law the "Detainee Treatment Act of 2005", which is sections 1001-1006 of the Department of Defense Appropriations Act of 2006, Public Law 109-148, 119 Stat. 2680. On January 6, 2006, he also signed the Department of Defense Authorization Act, Public Law 109-163, 119 Stat. 3136, which contains an identical "Detainee Treatment Act," only there it is numbered as sections 1401-1406.

brought before a CSRT, and those held in prisons other than Guantanamo are not. Such prisoners will be denied access to habeas corpus, even if they are held in the continental United States (new 28 USC 2241(e), quoted above), but would have no CSRT ruling to review before the D.C. Circuit. Also, it will often happen even at Guantanamo that lack of information or some other practical problem will delay the holding of a CSRT. Under the new law he or she may be detained without habeas corpus indefinitely, "awaiting such determination" (new 28 USC 2241(e)), with no CSRT to appeal and no access at all to the D.C. Circuit. In both of these situations, the MCA suspends habeas corpus with no attempt to provide any alternative remedy.

Once the D.C. Circuit gets authority to review, the DTA is clear that the scope of its inquiry is not that of a habeas corpus court:

> (C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—
> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.
>
> DTA 1405(e)(2)(C).

There is no authority for the D.C. Circuit to "dispose of the matter as law and justice require" as 28 USC 2243 would allow in habeas. There is no inquiry into conditions of confinement.

The clearest indication that the review in the D.C. Circuit is both inadequate and ineffective is the history of Paracha's own petition there. It was filed January 24, 2006, shortly after the DTA passed. Paracha's dispositive motion, showing he is entitled to immediate release, has been at issue since April 24, 2006. The D.C. Circuit, as an appellate court, has not been able to act on the motion, much less grant relief comparable to habeas corpus.

f. This suspension is a suspension barred by the prohibition of the suspension clause, and the omission of a sunset date does not make it any less prohibited.

One argument to save this suspension of habeas corpus must have the Founders turning in their graves: the argument that they intended to ban only suspensions which are temporary by their own terms, and that they would be perfectly happy with this suspension because there is no express time limit to its denial of the Great Writ. [6] /

Justice Scalia was obliged to face the Suspension Clause in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), because he held, contrary to the majority in that case, that Congress had spoken clearly through the statute in question and had unequivocally cut off the right to habeas corpus for the situation there before the Court. The statute was permanent in its terms, he argued, and therefore was an allowable repeal and not a prohibited suspension. 523 U.S., 337-338. We were asked to believe that the Founders banned the lesser, temporary abuse of suspension but had no aversion to

[6] / There is no way of guaranteeing permanency to any statute, so the idea of allowing permanent suspensions and prohibiting temporary ones is inherently unrealistic. Constitutional distinctions should be made of sterner stuff. The Founders thought long and hard about constitutional distinctions, and did not leave us with such superficial formalisms.

handing themselves over to unreviewable executive detention as long as they were doing so permanently.

The argument must also disturb the rest of the great lexicographers. *Webster's Third New International Dictionary (1966)* says: "Suspend . . . *sometimes:* to stop permanently: discontinue." *Cyclopedic Law Dictionary*, Shumaker and Longsdorf (Union, New Jersey: The Lawbook Exchange, 2001) says: "Suspend . . . while it ordinarily implies a temporary cessation, may in certain connections, imply a termination. 167 Mich. 123, 131." When someone is given a suspended sentence, the hope is that he will never serve it, not that he must come back on a day certain and start his imprisonment. When a debtor "suspends", the creditor may well know that he has no hope of resumption of payments.

In *Enright v. U.S.*, 54 F. 2d 182 (Ct. Cl., 1931) a contractor was told to "suspend" all work, and the Court of Claims held this was the same as a permanent termination. *Leibson v. Henry,* 204 S.W.2d 310, 314, 356 Mo. 953 (1947) considered a provision barring the restoration of a corporate charter if the business had been suspended, and concluded it must bar the restoration only if the business had been permanently abandoned. "A too literal construction of a section of a statue which would prevent the enforcement of the whole act according to its intent should be avoided." 204 S.W. 2d, 314. *Russ v. Civil Service Commission of Pine Bluff*, 262 S.W. 2d 137, 222 Ark. 666 (1953) held that a provision giving a fire chief "power to summarily suspend any member of the department" gave the chief the power and right to permanently discharge any fireman.

Thus the word "suspended" cannot bear the weight imputed to it, the unlikely hypothesis that the Founders prohibited the temporary withholding of the Great Writ but would allow its permanent destruction for any disfavored group of petitioners.

Justice Scalia argued that the difference between suspension and repeal lay in the danger of majoritarian abuse. A permanent withdrawal of habeas corpus, he said the Founders may have assumed, would be corrected by political means.

> That is, to be sure, an act subject to majoritarian abuse, as is Congress's framing (or its determination not to frame) a habeas statute in the first place. But that is not the majoritarian abuse against which the Suspension Clause was directed.
>
> *INS v. St. Cyr*, 533 U.S. 289, 338 (2001), Justice Scalia dissenting.

Justice Scalia could offer no rationale or support or authority for this *ipse dixit* that the Founders were only concerned with the lesser majoritarian abuse and not the greater, except that the lesser is more likely. But it is hard to imagine an abuse more that would have seemed more likely to the Founders than what has happened here. This suspension applies only to aliens, non-voters without even the bargaining power of a racial or political minority. This is precisely the kind of suspension the Founders would have most feared.

A review finds no other case relying on Justice Scalia's distinction between prohibited suspensions and allowable repeals, and he cited none. It was implicitly rejected by the majority in *St. Cyr, supra,* and Justice O'Connor wrote a separate dissent putting forth a different theory. [7] / The ostensible permanency of the suspension here cannot save it from its invalidity under the Suspension Clause.

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[7] / Probably if it comes before the Court again, Justice Scalia will follow *stare decisis* and will accept the rejection of his theory. Cf. *Clark v. Suarez Martinez*, 543 U.S. 371, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) where he accepted the Court's interpretation in *Zadvydas v. Davis*, 533 U.S.678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), that a statute did not

II. THE REFUSAL TO HEAR AND DETERMINE THIS PETITION FOR HABEAS CORPUS, NOW GOING INTO ITS THIRD YEAR AND PROMISING AT LEAST ANOTHER YEAR OR TWO OF DELAY, IS IN ITSELF A SUSPENSION OF THE WRIT, FORBIDDEN BY THE CONSTITUTION.

This petition for habeas corpus was filed two years ago next month. The habeas corpus statute sets out a time-table that can restore someone to liberty within days. There is no authority to delay or deny the writ until litigation in some other cases may change the law. The only case in point, *Yong v. INS*, 208 F. 3d 1116 (9th Cir., 2000), holds that such delay is improper.

The Suspension Clause says the privilege of the writ "shall not be suspended". This prohibition is not limited to Congress or the President. The prohibition was breached and the Constitution was violated when this Court entered a stay in this case, thereby suspending the writ as far as Paracha is concerned.

Respectfully submitted, October 30, 2006

_____/s/_____

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intend to authorize the indefinite detention of removable aliens, even though he had dissented when that issue was decided in *Zadvydas*.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,

Petitioner,

v. Case No. 04cv02022-PLF

Hon. GEORGE W. BUSH,

et al.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I served this "Petitioner's Notice of the Unconstitutionality of the Attempted Suspension of Habeas Corpus in the military Commissions Act of 2006" by delivering it to the Court Security Office on October 30, 2006, with the request to clear it and to deliver a copy to counsel for respondents, Andrew Warden, Esq., Room 6118, 20 Massachusetts Avenue NW, Washington, D.C. 20530

_____/s/_____ October 30, 2006

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