CBA Report
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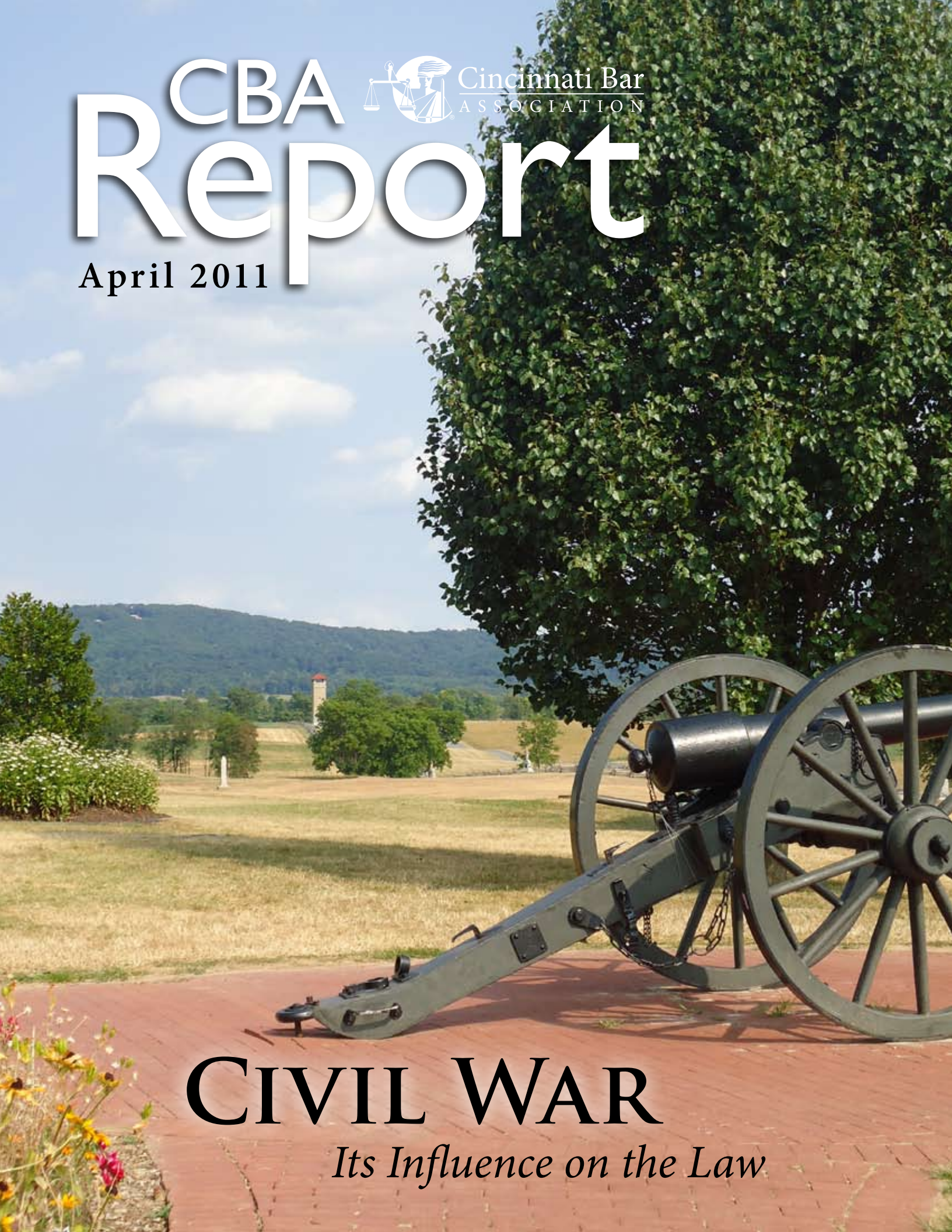

Civil War

Its Influence on the Law

CBA Report

Cincinnati Bar Association

What's inside…

Also inside…

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150th Anniversary

Legal Ramifications of the American Civil War

By William J. Mitchell

The American Civil War lasted from the bombardment of Fort Sumter on April 12, 1861, until April 9, 1865.[1] Thus, the next four years will provide ample opportunity to commemorate the 150th anniversary of various aspects of the War. Although political and military matters overshadow the legal issues that were involved, there is little doubt that the legal issues — only one of which was Lincoln's suspension of habeas corpus *— are critical to fully understanding one of the most pivotal periods in American history.*

The despot's heel is on thy shore,
Maryland, My Maryland!
His torch is at thy temple door,
Maryland, My Maryland!
Avenge the patriotic gore
That flecked the streets of Baltimore,
And be the battle queen of yore,
Maryland! My Maryland!

So begins the opening to "Maryland, My Maryland", the official state song of Maryland.[2] The first casualties of the American Civil War occurred in Baltimore on April 19, 1861.[3] Just days before the bloodshed, on April 15, 1861, President Lincoln issued a proclamation calling 75,000 militiamen into national service for 90 days to put down an insurrection "too powerful to be suppressed by the ordinary course of judicial proceedings."[4]

At the outset of the War, there was little consensus as to which side Maryland would choose. Maryland did not vote for Lincoln in the 1860 election. Southern-Rights Democrats controlled the legislature. The tobacco counties of southern Maryland and eastern shores of the Chesapeake Bay were secessionists. Although the counties of northern and western Maryland were pro-Union, Baltimore contained a third of the Maryland population and its loyalty to the Union was in doubt.[5]

On April 19, 1861, the 6th Massachusetts Volunteer Regiment, on its way to Washington D.C., entered Baltimore by train. Because the steam engine trains could not operate in Baltimore, the troops were required to leave the train on the east side of town, walk through town, and board another train to Washington D.C.[6]

As the 1,200 men of the Massachusetts Volunteer Regiment plodded their way through town, rioters pelted them with bricks and paving stones, and brandished pistols. A few soldiers opened fire. Four soldiers and 12 Marylanders died. They were the first of more than 700,000 combat casualties during the War.[7]

The 1861 Baltimore Riot continued to drive a wedge through the country. Baltimore's Mayor ordered bridges around Baltimore burned to prevent Northern troops from passing through the city. Aware that the loss of Maryland would be crippling, Lincoln decided that he would not send additional troops through Baltimore. Virginia had voted to leave the Union on April 17, 1861, and Lincoln knew that if Maryland left the Union, the Capital would be virtually surrounded by Southern troops. Lincoln recognized that he had to take steps to quell the anti-Union sentiment.

In response, on April 27, 1861, Lincoln sent a letter to General Winfield Scott suspending the writ of *habeas corpus*. Article I, Section 9, of the Constitution states 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." What was not clear was who had the power to suspend it.

The writ of *habeas corpus* is considered a bedrock safeguard of personal liberty and it has a rich history in the common-law courts of England. Its purpose is to protect innocent persons from »

The Burnside Bridge stands as a memorial to the bloody fighting at Antietam.

Photos by Onnika M.L. Mitchell

improper arrests and imprisonment, by requiring that the imprisoned person be brought to court, so that the custodian of the detained person can be questioned as to the legality of the detention.

The Judiciary Act of 1789 granted federal courts jurisdiction to order writs of *habeas corpus*. Lincoln was concerned that without suspension of the writ, federal judges sympathetic to the South would release pro-secessionists from imprisonment almost overnight. Lincoln's decision to suspend the writ was not made without agonizing over the reality that he was eliminating a great civil liberty: "Few measures of the Lincoln administration were adopted with more reluctance than this suspension of the citizen's safeguard against arbitrary arrest." [8]

A statue of Union Major General Warren stands over a forever stilled battlefield at Gettysburg.

Within a month, Army officers began arresting a number of secessionists and imprisoning them in Baltimore's Fort McHenry.[9] John Merryman, a wealthy landowner and alleged lieutenant in a secessionist cavalry that had burned bridges and torn down telegraph wires the month before, was one of those arrested. The military authorities accused him of being guilty of "acts of treason." His lawyers sought a writ of *habeas corpus*.

While the U.S. Supreme Court was not in session, the senior judge of the United States Circuit Court for the District of Maryland was Supreme Court Chief Justice Roger B. Taney.[10] On May 26, 1861, Taney issued a writ ordering the commanding officer at Fort McHenry to bring Merryman before the court the next day at 11 a.m. to show cause for his arrest. The writ was served upon General Cadwalader at Fort McHenry by a U.S. Marshall.

At 11 a.m. the next day, neither General Cadwalader nor John Merryman were present. A Union Colonel named Lee appeared in court with a written response from General Cadwalader. The response stated that Merryman had been arrested and brought to Fort McHenry on May 20, 1861, charged with various acts of treason. The General's statement said that he was "duly authorized by the President of the United States in such cases to suspend the writ of *habeas corpus* for the public safety."[11] Judge Taney demanded that General Cadwalader appear before him the next day at noon.

The next day brought no change. Colonel Lee was present, but the General and Merryman were nowhere to be seen. Judge Taney proceeded to read a statement that the President was not authorized under the Constitution to suspend the writ, nor authorize a military officer to do so. Taney stated that he would issue a written opinion within a week.

On May 28, 1861, Taney issued a written opinion.[12] It held that Lincoln did not have the right to suspend the writ. The highest judicial officer of the United States had publicly challenged the highest executive officer, and the challenge struck at the foundations of the President's authority to suppress the rebellion.[13] Not surprisingly, Northern newspapers lambasted the decision.[14]

Lincoln did not immediately respond. On July 4, 1861, Lincoln delivered the following address to Congress: "The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such case, would not the official oath be broken, if the government be overthrown, when it was believed that disregarding the single law, would tend to preserve it."[15]

Taney was convinced that the power to suspend the writ belonged solely to Congress, due in part to its placement in Article I, which concerns the powers of Congress. Lincoln believed that as commander in chief of the Army and Navy, he had the authority to suspend the writ.

Taney's decision reviewed the limited historical discussions of suspending the writ. He noted that President Jefferson called on Congress to suspend the writ in 1807 in relation to Aaron Burr. He quoted from the Commentaries of Joseph Story that "it would seem, as the power is given to Congress to suspend the writ … that the right to judge whether the exigency had arisen must exclusively belong to that body."[16]

Taney also quoted an earlier statement by Chief Justice Marshall that, "if at any time the public safety should require the suspension of the powers vested by this act [the Judiciary Act of 1789] in the courts of the United States, it is for the legislature to say so."[17]

Lincoln argued that as commander in chief of the armed forces, and as the only federal official charged with a constitutional duty to "preserve, protect, and defend the Constitution," he was as fully empowered by the Constitution as Congress was, to decide if and when the public safety required a suspension of the writ.[18] That same summer, Congress approved an act ratifying and approving the President's previous War measures. The Act did not specifically mention the president's suspension of the writ, but was broad enough to have done so.

Perhaps Judge Taney placed too much importance on the location of the Suspension Clause within Article I of the Constitution. Records from the Constitutional Convention of 1787 show that the Suspension Clause was originally in the article governing the judiciary, but the Committee on Style moved it at the last minute without explanation. Taney also ignored his previous opinion in *Luther vs. Borden*,[19] in which he held that federal courts have no authority to second-guess

executive and legislative officials who had acted to put down the Dorr Rebellion in Rhode Island. Taney wrote, "[a]fter the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."[20]

Lincoln essentially chose not to comply with Judge Taney's opinion. Merryman was never brought to trial, and eventually released a few months later. The *Habeas Corpus* Act of 1863 approved further suspensions of *habeas corpus*, and the military continued to make arrests throughout the war. This leaves one to wonder: How does the Suspension Clause comport with notions of due process, and is it relevant in the modern legal age?

Some scholars have argued that the Suspension Clause supersedes the Due Process Clause because the very purpose of suspension is to allow Congress to override core due process safeguards to enable the executive to effectively combat a national crisis.[21] Others have argued that the Suspension Clause must bow to the protections afforded by due process: "It is impossible to reconcile the exercise of such unrestrained and unchecked authoritarian power with our constitutional commitment to the rule of law and steadfast aversion to tyranny. Therefore, in order to preserve the foundations of American constitutionalism — the system that guarantees continuation of democratic government — the Suspension Clause must be viewed as limited by the Due Process Clause and superseded to the extent the two provisions are found to be inconsistent."[22]

Modern day relevancy of the Suspension Clause is apparent in *Boumediene v. Bush*,[23] in which the U.S. Supreme Court held that section 7 of the Military Commissions Act of 2006 violated the Suspension Clause by withdrawing the jurisdiction of the federal courts to entertain *habeas corpus* petitions from security detainees at Guantanamo Bay Naval Base in Cuba, without giving them an adequate and effective substitute judicial remedy. The military hearing before a Combatant Status Review Tribunal (CSRT) and the limited judicial review available in the D.C. Circuit under the Detainee Treatment Act of 2005, both separately and in combination, did not provide the prisoners with an adequate opportunity to secure release by challenging the lawfulness of their detention, especially with regard to issues of fact.[24]

This sign at Antietam needs no further explanation.

As the American Civil War is commemorated, not only is it timely to reflect on the political and military implications, but also on legal issues like this which continue to impact our nation.

Mitchell practices law in Kenwood. He is licensed in Michigan, Kentucky and Ohio. His primary areas of practice include condominiums, business, and estate planning.

1 Although General Robert E. Lee surrendered on April 9, 1865 at Appomattox Court House, some fighting continued for another two months.

2 The lyrics are based on a poem written by James Ryder Randall in 1861, following the death of Randall's friend during the Baltimore Riot of 1861. It was intended as a call to Maryland to secede from the Union. The song is sung to the tune of "Lauriger Horatius", more commonly known as "O Tannenbaum". Over the past 30 years numerous bills have been introduced in the Maryland House to change the lyrics but none have been successful. Other lyrics include, references to "Northern scum" and Lincoln is characterized as a "despot" and "tyrant."

3 The Southern bombardment of Fort Sumter caused no deaths. However, during the ceremonial surrender of the Fort, a cannon accidentally exploded killing one soldier.

4 James M. McPherson, Battle Cry of Freedom 274 (1988).

5 James M. McPherson, Battle Cry of Freedom 285 (1988).

6 An 1831 ordinance prohibited steam trains from operating within Baltimore. Brian McGinty, Lincoln & The Court 66 (2008). Thus, the railroad cars carrying the troops were required to be pulled by horses across town. As this was happening, bricks were thrown through the rail car windows, so the troops opted to leave the rail cars and walk through town. William H. Rehnquist, All The Laws But One – Civil Liberties In Wartime 20 (1998).

7 James M. McPherson, Battle Cry of Freedom 274 (1988).

8 James G. Randall, Constitutional Problems under Lincoln, 121 (1997).

9 One of those arrested was the grandson of Francis Scott Key who had penned, "The Star Spangled Banner" a half-century earlier while Fort McHenry was under British bombardment. James M. McPherson, Battle Cry of Freedom 287 (1988).

10 Taney is best known for his 1857 opinion in *Dred Scott vs. Sandford*, 60 U.S. 393 (1857), which later Chief Justice Charles Evans Hughes described as a "self-inflicted wound." The case involved the question of whether a slave who is taken by his owner from a slave state to a free state, then to a free territory, and eventually returned to the slave state, was emancipated by virtue of his stay in the free state or territory. William H. Rehnquist, All The Laws But One – Civil Liberties In Wartime 28 (1998). The lower federal court held that Dred Scott could not maintain a federal lawsuit because he was not a citizen. The Supreme Court agreed. "Taney's opinion, which required two hours to deliver orally, said not merely that slaves could not be citizens, but that Negroes could not be citizens." William H. Rehnquist, All The Laws But One – Civil Liberties In Wartime 30 (1998). Lincoln, in his debates with Stephen A. Douglas in 1958, greatly criticized the Dred Scott decision, and thus began his ideological disagreement with Taney.

11 Brian McGinty, Lincoln & The Court 74 (2008).

12 Ex parte Merryman, 17 F. Cas. 144 (1861).

13 Brian McGinty, Lincoln & The Court 75 (2008).

14 "This golden age of newspapers did not necessarily guarantee readers greater reliability than the noisy outlets we have today. Unlike today's big urban dailies, nineteenth century papers did not pretend to be neutral and impartial dispensers of information. They were openly and proudly partisan." The New York Times Complete Civil War, 2010, Foreword by President Bill Clinton, 6 (2010).

15 Brian McGinty, Lincoln & The Court 81 (2008).

16 Brian McGinty, Lincoln & The Court 78 (2008).

17 Ex parte Bollman, 4 Cranch (8 U.S.) 75, 101 (1807).

18 Brian McGinty, Lincoln & The Court 66 (2008).

19 48 U.S. 1 (1849).

20 48 U.S. at 43 (1849).

21 Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600, 637 (2009).

22 Martin H. Redish and Colleen McNamara, Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism, 96 Virginia Law Review 1361, 1416 (2010).

23 553 U.S. 723 (2008).

24 Gerald L. Neuman, The Habeas Corpus Suspension Clause After Boumediene v. Bush, 110 Columbia Law Review 537 (2010). See also Hamdi vs. Rumsfeld, 542 U.S. 507 (2004) in which the Supreme Court reversed the dismissal of a habeas corpus petition brought on behalf of a U.S. citizen. The Court held that the government had the authority to detain enemy combatants, but that those being detained that are U.S. citizens have the right to challenge their enemy combatant status in front of an impartial judge.