Habeas corpus

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A writ of ***habeas corpus*** (English pronunciation: /ˌheɪbiəs ˈkɔrpəs/; Latin: "you may have the body") is a writ (court order) that requires a person under arrest to be brought before a judge or into court.[1][2] The principle of habeas corpus ensures that a prisoner can be released from unlawful detention—that is, detention lacking sufficient cause or evidence. The remedy can be sought by the prisoner or by another person coming to the prisoner's aid. This right originated in the English legal system, and is now available in many nations. It has historically been an important legal instrument safeguarding individual freedom against arbitrary state action.

A writ of *habeas corpus*, also known as the **"great writ"**, is a summons with the force of a court order; it is addressed to the custodian (a prison official for example) and demands that a prisoner be taken before the court, and that the custodian present proof of authority, allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond his authority, then the prisoner must be released. Any prisoner, or another person acting on his or her behalf, may petition the court, or a judge, for a writ of *habeas corpus*. One reason for the writ to be sought by a person other than the prisoner is that the detainee might be held incommunicado. Most civil law jurisdictions provide a similar remedy for those unlawfully detained, but this is not always called "habeas corpus".[3] For example, in some Spanish-speaking nations, the equivalent remedy for unlawful imprisonment is the *amparo de libertad* ('protection of freedom').

Habeas corpus has certain limitations. It is technically only a procedural remedy; it is a guarantee against any detention that is forbidden by law, but it does not necessarily protect other rights, such as the entitlement to a fair trial. So if an imposition such as internment without trial is permitted by the law, then *habeas corpus* may not be a useful remedy. In some countries, the process has been temporarily or permanently suspended, in all of a government's jurisdictions or only some, because of what might be construed by some government institutions as a series of events of such relevance to the government as to warrant a suspension; in more recent times, such events may have been frequently referred to as "national emergencies."

The right to petition for a writ of *habeas corpus* has nonetheless long been celebrated as the most efficient safeguard of the liberty of the subject. The jurist Albert Venn Dicey wrote that the British Habeas Corpus Acts "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".[4]

The writ of *habeas corpus* is one of what are called the "extraordinary", "common

law", or "prerogative writs", which were historically issued by the English courts in the name of the monarch to control inferior courts and public authorities within the kingdom. The most common of the other such prerogative writs are *quo warranto*, *prohibito*, *mandamus*, *procedendo*, and *certiorari*. The due process for such petitions is not simply civil or criminal, because they incorporate the presumption of non-authority. The official who is the respondent has the burden to prove his authority to do or not do something. Failing this, the court must decide for the petitioner, who may be any person, not just an interested party. This differs from a motion in a civil process in which the movant must have standing, and bears the burden of proof.

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Etymology

From Latin *habeas*, 2nd person singular present subjunctive active of *habere*, "to

have", "to hold"; and *corpus*, accusative singular of *corpus* "body". In reference to more than one person, *habeas corpora*.

Literally the phrase means "you may have the body". The complete phrase *habeas corpus ad subjiciendum* means "you may have the person to be subjected to (examination)". These are the opening words of writs in 14th century Anglo-French documents requiring a person to be brought before a court or judge, especially to determine if that person is being legally detained.[5]

> *Praecipimus tibi quod **corpus** A.B. in prisona nostra sub custodia tua detentum, ut dicitur, una cum die et causa captionis et detentionis suae, quocumque nomine praedictus A.B. censeatur in eadem, **habeas** coram nobis ... ad subjiciendum et recipiendum ea quae curia nostra de eo adtunc et ibidem ordinare contigerit in hac parte. Et hoc nullatenus omittatis periculo incumbente. Et habeas ibi hoc breve.*

> We command you, that the **body** of A.B. in Our prison under your custody detained, as it is said, together with the day and cause of his taking and detention, by whatever name the said A.B. may be known therein, **you have** at our Court ... to undergo and to receive that which our Court shall then and there consider and order in that behalf. Hereof in no way fail, at your peril. And have you then there this writ.

Examples

> VICTORIA by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to J.K., Keeper of our Gaol of Jersey, in the Island of Jersey, and to J.C. Viscount of said Island, Greeting.
>
> We command you that you have the body of C.C.W. detained in our prison under your custody, as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, in our Court before us, at Westminster, on the 18th day of January next, to undergo and receive all and singular such matters and things which our said Court shall then and there

consider of in this behalf; and have there then this Writ.

United States of America, Second Judicial Circuit, Southern District of New York, ss.:

We command you that the body of Charles L. Craig, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, within the circuit and district aforesaid, to do and receive all and singular those things which the said judge shall then and there consider of him in this behalf; and have you then and there this writ.

Similarly named writs

The full name of the writ is often used to distinguish it from similar ancient writs, also named *habeas corpus*. These include:

- *Habeas corpus ad deliberandum et recipiendum*: a writ for bringing an accused from a different county into a court in the place where a crime had been committed for purposes of trial, or more literally to return holding the body for purposes of “deliberation and receipt” of a decision. ("Extradition")
- *Habeas corpus ad faciendum et recipiendum* (also called *habeas corpus cum causa*): a writ of a superior court to a custodian to return with the body being held by the order of a lower court "with reasons", for the purpose of “receiving” the decision of the superior court and of “doing” what it ordered.
- *Habeas corpus ad prosequendum*: a writ ordering return with a prisoner for the purpose of “prosecuting” him before the court.
- *Habeas corpus ad respondendum*: a writ ordering return to allow the prisoner to “answer” to new proceedings before the court.
- *Habeas corpus ad testificandum*: a writ ordering return with the body of a prisoner for the purposes of “testifying".

Origins in England

Further information: English law

In the 17th century the foundations for *habeas corpus* were "wrongly thought" to have originated in Magna Carta.[6] This charter declared that:

No Freeman shall be taken or imprisoned, or be disseized of his Freehold,

> or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land.

William Blackstone cites the first recorded usage of *habeas corpus ad subjiciendum* in 1305, during the reign of King Edward I. However, other writs were issued with the same effect as early as the reign of Henry II in the 12th century. Blackstone explained the basis of the writ, saying "The King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." The procedure for issuing a writ of *habeas corpus* was first codified by the Habeas Corpus Act 1679, following judicial rulings which had restricted the effectiveness of the writ. A previous law (the Habeas Corpus Act 1640) had been passed forty years earlier to overturn a ruling that the command of the King was a sufficient answer to a petition of *habeas corpus*.

Then, as now, the writ of *habeas corpus* was issued by a superior court in the name of the Sovereign, and commanded the addressee (a lower court, sheriff, or private subject) to produce the prisoner before the royal courts of law. A *habeas corpus* petition could be made by the prisoner himself or by a third party on his behalf and, as a result of the Habeas Corpus Acts, could be made regardless of whether the court was in session, by presenting the petition to a judge. Since the 18th century the writ has also been used in cases of unlawful detention by private individuals, most famously in *Somersett's Case* (1772), where the black slave Somersett was ordered to be freed.[7] In that case these famous words are said to have been uttered "The air of England has long been too pure for a slave, and every man is free who breathes it".[8]

The privilege of *habeas corpus* has been suspended or restricted several times during English history, most recently during the 18th and 19th centuries. Although internment without trial has been authorised by statute since that time, for example during the two World Wars and the Troubles in Northern Ireland, the *habeas corpus* procedure has in modern times always technically remained available to such internees. However, as *habeas corpus* is only a procedural device to examine the lawfulness of a prisoner's detention, so long as the detention is in accordance with an Act of Parliament, the petition for *habeas corpus* is unsuccessful. Since the passage of the Human Rights Act 1998, the courts have been able to declare an Act of Parliament to be incompatible with the European Convention on Human Rights, but such a declaration of incompatibility has no legal effect unless and until it is acted upon by the government.

The wording of the writ of *habeas corpus* implies that the prisoner is brought to the court for the legality of the imprisonment to be examined. However, rather than issuing the writ immediately and waiting for the return of the writ by the custodian, modern practice in England is for the original application to be followed by a hearing with both parties present to decide the legality of the detention, without any writ being issued. If the detention is held to be unlawful, the prisoner can

usually then be released or bailed by order of the court without having to be produced before it. It is also possible for individuals held by the state to petition for judicial review, and individuals held by non-state entities to apply for an injunction.

Other jurisdictions

Australia

The writ of *habeas corpus* as a procedural remedy is part of Australia's English law inheritance.[9] In 2005, the Australian parliament passed the Australian Anti-Terrorism Act 2005. Some legal experts questioned the constitutionality of the act, due in part to limitations it placed on *habeas corpus*.[10]

Canada

Habeas corpus rights are part of the British legal tradition inherited by Canada. The rights exist in the common law but have been enshrined in the Constitution Act 1982, under Section Ten of the Charter of Rights and Freedoms.[11] This states that "Everyone has the right on arrest or detention... (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

Suspension of the writ in Canadian history occurred famously during the October Crisis, during which the War Measures Act was invoked by the Governor General of Canada on the constitutional advice of Prime Minister Pierre Trudeau, who had received a request from the Quebec Cabinet. The Act was also used to justify German, Slavic, and Ukrainian Canadian internment during the First World War, and the internment of German-Canadians, Italian Canadians and of Japanese Canadians during the Second World War. The writ was suspended for several years following the Battle of Fort Erie (1866) during the Fenian Rising, though the suspension was only ever applied to suspects in the Thomas D'Arcy McGee assassination.[12]

The writ is available where there is no other adequate remedy. However, a superior court always has the discretion to grant the writ even in the face of an alternative remedy (see May v. Ferndale Institution). Under the Criminal Code of Canada the writ is largely unavailable if a statutory right of appeal exists, whether or not this right has been exercised.

Germany

Germany has constitutional guarantees against improper detention and have been implemented in statutory law in a manner that can be considered as equivalent to writs of habeas corpus.

Article 104, paragraph 1 of the German Constitution provides that deprivations of liberty may be imposed only on the basis of a specific enabling statute that also must include procedural rules. Article 104, paragraph 2 requires that any arrested individual be brought before a judge by the end of the day following the day of the arrest. For those detained as criminal suspects, article 104, paragraph 3 specifically requires that the judge must grant a hearing to the suspect in order to rule on the detention.

Restrictions on the power of the authorities to arrest and detain individuals also emanate from article 2 paragraph 2 of the Constitution which guarantees liberty and requires a statutory authorization for any deprivation of liberty. In addition, several other articles of the Constitution have a bearing on the issue. The most important of these are article 19, which generally requires a statutory basis for any infringements of the fundamental rights guaranteed by the Constitution while also guaranteeing judicial review; article 20, paragraph 3, which guarantees the rule of law; and article 3 which guarantees equality.

In particular, a constitutional obligation to grant remedies for improper detention is required by article 19, paragraph 4 of the Constitution which provides as follows: "Should any person’s right be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts."[13]

India

The Indian judiciary, in a catena of cases, has effectively resorted to the writ of *habeas corpus* to secure release of a person from illegal detention. The Indian judiciary has dispensed with the traditional doctrine of *locus standi*, so that if a detained person is not in a position to file a petition, it can be moved on his behalf by any other person. The scope of *habeas* relief has expanded in recent times by actions of the Indian judiciary.[14] The habeas writ was used in the Rajan case. Recently on 12th March 2014, Subrata Roy's counsel approached the Chief Justice moving a habeas corpus petition. It was also filed by Panthers Party to protest the imprisonment of Anna Hazare, a social activist. It is issued only against public servant or public officer not for single person.

Ireland

In the Republic of Ireland access to a similar remedy to *habeas corpus* is guaranteed by Article 40.4 of the 1937 constitution. This guarantees "personal liberty" to each individual and outlines a detailed procedure. It does not mention the Latin term but includes the English phrase "produce the body". The constitution provides that this procedure is not binding on the Defence Forces during a state of war or armed rebellion.

The term 'habeas corpus' as used in the Rules of the Superior Courts does not refer to the constitutional procedure outlined below but to provisions still operable of the Habeas Courpus Acts- The State (Ahern) v Cotter [1982] IR 188

The expression 'order of Habeas Corpus' does not include an order made pursuant to Article 40, section 4 of the Constitution. Order 84 r 1(2) RSC

Article 40.4.2° states that a prisoner, or anyone acting on his behalf, may make a complaint to the High Court (or to any High Court judge) of unlawful detention. The court must then investigate the matter "forthwith" and may order that the defendant bring the prisoner before the court and give reasons for his detention. The court must immediately release the detainee unless it is satisfied that he is being held lawfully. The full text of the provision is as follows:

> Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to *produce the body* of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law. [*Italics* added]

The state inherited *habeas corpus* as part of the common law when it seceded from the United Kingdom in 1922, but the remedy was also guaranteed by Article 6 of the Constitution of the Irish Free State in force from 1922 to 1937. A similar provision was included when the current constitution was adopted in 1937. Since that date *habeas corpus* has been restricted by two constitutional amendments, the Second Amendment in 1941 and the Sixteenth Amendment in 1996.

Before the Second Amendment, an individual detained had the constitutional right to apply to any High Court judge for a writ of *habeas corpus* and to as many High Court judges as he wished. Since the Second Amendment, a prisoner has had only the right to apply to one judge, and, once a writ has been issued, the President of the High Court has authority to choose the judge or panel of three judges who will decide the case. The amendment also added a requirement that if the High Court believes someone's detention to be invalid due to the unconstitutionality of a law, it must refer the matter to the Irish Supreme Court and may only release the individual on bail in the interim.

In 1965, the Supreme Court ruled in the *O'Callaghan* case that the provisions of the constitution meant that an individual charged with a crime could be refused bail

only if she was likely to flee or to interfere with witnesses or evidence. Since the Sixteenth Amendment, it has been possible for a court to take into account whether a person has committed serious crimes while on bail in the past.

Italy

In Italy the principle of *habeas corpus* is enshrined in Article 13 of the Constitution, which states:[15]

"Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. The law shall establish the maximum duration of preventive detention."

Malaysia

In Malaysia, the remedy of *habeas corpus* is guaranteed by the federal constitution, although not by name. Article 5(2) of the Constitution of Malaysia provides that "Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

As there are several statutes, for example, the Internal Security Act 1960, that still permit detention without trial, the procedure is usually effective in such cases only if it can be shown that there was a procedural error in the way that the detention was ordered.

New Zealand

In New Zealand *habeas corpus* may be invoked against the government or private individuals. In 2006, a child was allegedly kidnapped by his maternal grandfather after a custody dispute. The father began *habeas corpus* proceedings against the mother, the grandfather, the grandmother, the great grandmother, and another person alleged to have assisted in the kidnap of the child. The mother did not present the child to the court and so was imprisoned for contempt of court.[16] She was released when the grandfather came forward with the child in late January 2007.

Pakistan

Issuance of a writ is an exercise of an extraordinary jurisdiction of the superior courts in Pakistan. A writ of habeas corpus may be issued by any High Court of a province in Pakistan. Article 99 of the 1973 Constitution of the Islamic Republic of Pakistan, specifically provides for the issuance of a writ of habeas corpus, empowering the courts to exercise this prerogative. Subject to the Article 99 of the Constitution, "A High Court may, if it is satisfied that no other adequate remedy is provided by law,on the application of any person, make an order that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner" .The hallmark of extraordinary constitutional jurisdiction is to keep various functionaries of State within the ambit of their authority. Once a High Court has assumed jurisdiction to adjudicate the matter before it, justiciability of the issue raised before it is beyond question. The Supreme Court of Pakistan has stated clearly that the use of words “in an unlawful manner” implies that the court may examine, if a statute has allowed such detention, whether it was a colorable exercise of the power of authority.Thus, the court can examine the malafides of the action taken.[17]

The Philippines

In the Bill of Rights of the Philippine constitution, *habeas corpus* is guaranteed in terms almost identically to those used in the U.S. Constitution. in Article 3, Section 15 of the Constitution of the Philippines states that "The privilege of the writ of *habeas corpus* shall not be suspended except in cases of invasion or rebellion when the public safety requires it."

In 1971, after the Plaza Miranda bombing, the Marcos administration, under Ferdinand Marcos, suspended *habeas corpus* in an effort to stifle the oncoming insurgency, having blamed the Filipino Communist Party for the events of August 21. Many considered this to be a prelude to Martial Law. After widespread protests, however, the Marcos administration decided to reintroduce the writ. In December 2009, *habeas corpus* was suspended in Maguindanao as the province was placed under martial law. This occurred in response to the Maguindanao massacre.[18]

Scotland

The Parliament of Scotland passed a law to have the same effect as *habeas corpus* in the 18th century. This now known as the Criminal Procedure Act 1701 c.6.[19] It was originally called "the Act for preventing wrongful imprisonment and against undue delays in trials". It is still in force although certain parts have been repealed.

Spain

In 1526 the *Fuero Nuevo* established a form of *habeas corpus* in the territory of the *Señorío de Vizcaya*. The present Constitution of Spain states that "A *habeas corpus* procedure shall be provided for by law to ensure the immediate handing over to the judicial authorities of any person illegally arrested". The statute which regulates the procedure is the Law of Habeas Corpus of 24 May 1984 which provides that a person imprisoned may, on his own or through a third person, allege he is imprisoned unlawfully and request to appear before a judge. The request must specify the grounds on which the detention is considered to be unlawful which can be, for example, that the custodian holding the prisoner does not have the legal authority, that the prisoner's constitutional rights have been violated, or that he has been subjected to mistreatment. The judge may then request additional information if needed and may issue a *habeas corpus* order at which point the custodian has 24 hours to bring the prisoner before the judge.

United States

Main article: Habeas corpus in the United States

The United States inherited *habeas corpus* from the English common law. In England the writ was issued in the name of the monarch. When the original thirteen American colonies declared independence, and became a republic based on popular sovereignty, any person, in the name of the people, acquired authority to initiate such writs. The U.S. Constitution specifically includes the *habeas* procedure in the Suspension Clause (Clause 2), located in Article One, Section 9. This 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." Section 9 is under Article 1 which states, "legislative Powers herein granted shall be vested in the Congress of the United States..."

The writ of *habeas corpus ad subjiciendum* is a civil, not criminal, *ex parte* proceeding in which a court inquires as to the legitimacy of a prisoner's custody. Typically, *habeas corpus* proceedings are to determine whether the court which imposed sentence on the defendant had jurisdiction and authority to do so, or whether the defendant's sentence has expired. *Habeas corpus* is also used as a legal avenue to challenge other types of custody such as pretrial detention or detention by the United States Bureau of Immigration and Customs Enforcement pursuant to a deportation proceeding.

Presidents Abraham Lincoln and Ulysses Grant suspended *habeas corpus* during the Civil War and Reconstruction for some places or types of cases.[20][21]

Equivalent remedies

Poland

In 1433 King Jagiełło granted the Privilege of Jedlnia, which proclaimed, *Neminem captivabimus nisi iure victum* ("We will not imprison anyone except if convicted by law"). This revolutionary innovation in civil libertarianism gave Polish citizens due process-style rights that did not exist in any other European country for another 250 years. Originally, the Privilege of Jedlnia was restricted to the nobility (the szlachta), but it was extended to cover townsmen in the 1791 Constitution. Importantly, social classifications in the Polish-Lithuanian Commonwealth were not as rigid as in other European countries; townspeople and Jews were sometimes ennobled. The Privilege of Jedlnia provided broader coverage than many subsequently enacted habeas corpus laws because Poland's nobility constituted an unusually large percentage of the country's total population, which was Europe's largest. As a result, by the 16th century, it was protecting the liberty of between 500 thousand and a million Poles.[22]

Roman-Dutch law

In South Africa and other countries whose legal systems are based on Roman-Dutch law, the *interdictum de homine libero exhibendo* is the equivalent of the writ of *habeas corpus*.[23] In South Africa it has been entrenched in the Bill of Rights, which provides in section 35(2)(d) that every detained person has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.

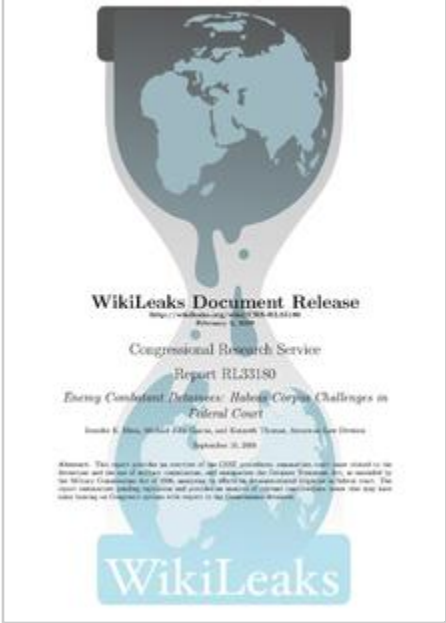
World *habeas corpus*

In the 1950s, American lawyer Luis Kutner began advocating an international writ of *habeas corpus* to protect individual human rights. In 1952 he filed a petition for a "United Nations Writ of Habeas Corpus" on behalf of William N. Oatis, an American journalist jailed the previous year by the Communist government of Czechoslovakia.[24] Alleging that Czechoslovakia had violated Oatis's rights under the United Nations Charter and the Universal Declaration of Human Rights and that the United Nations General Assembly had "inherent power" to fashion remedies for human rights violations, the petition was filed with the United Nations Commission on Human Rights.[25] The Commission forwarded the petition to Czechoslovakia, but no other United Nations action was taken.[25] Oatis was released in 1953. Kutner went on to publish numerous articles and books advocating the creation of an "International Court of Habeas Corpus".[26]

See also

- Arbitrary arrest and detention
- *corpus delicti* – other Latin legal term using *corpus,* here meaning the fact of a crime having been committed, not the body of the person being detained nor

(as sometimes inaccurately used) to the body of the victim
- Habeas corpus petitions of Guantanamo Bay detainees
- *Habeas Corpus* (play), by the English writer and playwright Alan Bennett.
- Habeas Corpus Restoration Act of 2007
- Habeas Data
- Edward Hyde, 1st Earl of Clarendon
- List of legal Latin terms
- Military Commissions Act of 2006
- Murder conviction without a body
- Philippine Habeas Corpus Cases
- *Recurso de amparo* (Writ of *amparo*)
- *Subpoena ad testificandum*
- *Subpoena duces tecum*



Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court

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Further reading

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External links

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- Barristermagazine.com (http://www.barristermagazine.com/)
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- This American Life: 331: Habeas Schmabeas 2007 (http://www.thislife.org/Radio_Episode.aspx?episode=331)
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Retrieved from "http://en.wikipedia.org/w/index.php?title=Habeas_corpus&oldid=599247263"
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