

Writs & Habeas Corpus



writ

- an order issued by a court requiring that something be done or giving authority to do a specified act

<http://bit.ly/WritDefinition>

writ of Mandamus

- directs a public official or govt. dept. to take an action
 - it may be sent to the Executive Branch, the Legislative branch, or a lower court
 - famous in *Marbury v Madison* (1803) which was an action for a *writ of mandamus*

writ of prohibition

- it commands a government official NOT to take a specified action
 - most common use is by an appellate court to a lower court, commanding the lower court to refrain from a proposed action

writ of Quo Warranto

- starts a proceeding in which the state challenges the legality of the use of an office, franchise, charter, or other right that can be held or used under authority of the state

writ of attachment

- a court order used to force obedience/compliance to another order or a judgment of the court

writ of execution

- issued after a plaintiff wins a judgment in a civil case and is awarded damages

writ of certiorari

- issued by an appellate court that is used by that court when it has discretion on whether to hear an appeal from a lower court
 - if the writ is denied, the lower court decision remains unchanged
 - most commonly known and used by the Supreme Court

writ of habeas corpus

- aka “the great writ”
- a legal document ordering anyone who is officially holding the **petitioner** (the person requesting the writ) to bring him into court to determine whether the detention is unlawful

HABEAS CORPUS

habeas corpus

- Latin for *you have the body*
 - In this case does the government have the body legally/lawfully?

<http://bit.ly/HabeasCorpusDef>

Habeas corpus is a check

- the writ of habeas corpus serves as an important check on the manner in which state courts pay respect to federal constitutional rights
- “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action” -*Harris v Nelson (1969)*

no habeas corpus?

- **Military Commissions Act of 2006**
 - revoked the right to habeas corpus for anyone detained at Guantanamo Bay as well as for any foreigner the govt detains anywhere and labels an “enemy combatant”
 - technically this could be used against US citizens if they are labeled “enemy combatants”

THE JUDICIARY



Structure of the Federal Courts

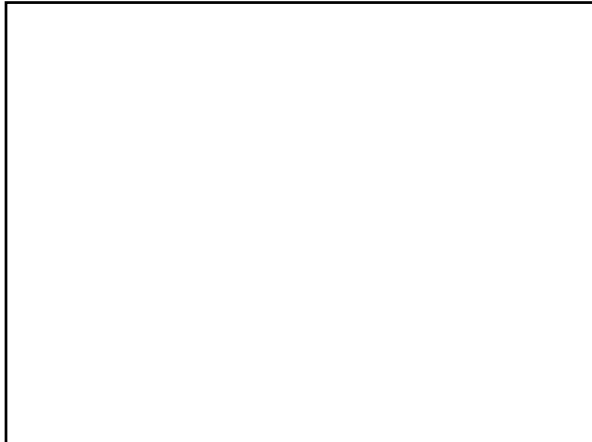
- **CONSTITUTIONAL COURTS**
 - judges nominated by president and confirmed by Senate
 - only the Supreme Court mentioned in the Constitution
 - lifetime tenure for judges
 - Congress has created constitutional courts
 - 94 district courts
 - 11 courts of appeals
 - **legislative courts** -set up by Congress for a special purpose and everyone working in them has a fixed term

Senatorial Courtesy

- allows senators to control who serves in their states
- no senatorial courtesy in choosing Supreme Court justices

Litmus Test

- when a potential judge is asked a series of questions to determine his political inclinations and then chosen or rejected based on those responses
- many people find this unfair and some judges have purposely answered vaguely by saying they hadn't made up their minds yet about those topic
 - abortion, civil rights, etc...



THE SUPREME COURT

it's much more than just Article III

Marbury v Madison

What *really* happened...

**What do YOU know about
Marbury v Madison?**

John Adams & Thomas Jefferson



A little historical background...

- John Adams and Thomas Jefferson didn't like each other
- John Marshall was John Adams' last Sec of State
- Marshall-delivery guy
- Marbury-a guy supposed to receive a commission to become a Justice of the Peace

“mandamus”

- Latin for “we order”
- aka “writ of mandate”
- writ of mandate orders a public agency or governmental body to perform an act required by law that it has neglected or refused to do

like any good American...

- Marbury sues in court to get his commission back
- Which court?
 - the Supreme Court
- Why?
 - Judicial Act of 1789 which set up the federal judicial system said that cases of mandamus were supposed to be tried in the Supreme Court

1803 Marbury v Madison

- Marbury has a winning case
- Marshall agrees...everything was done correctly BUT...
- Art III of the constitution doesn’t say the Supreme Court has the power to issue mandamus because it’s not in the Constitution
 - Marshall says that Congress can’t add to the original jurisdiction of the SC set by the Constitution

So...

- Marbury loses
- Marshall, in the process of ruling on Marbury’s case, said that Congress can’t change the original jurisdiction of the SC and the legislation (Article 25 of the 1789 Judiciary Act) that gave it that power is UNCONSTITUTIONAL and void

Art 25 Judiciary Act of 1789

- granted the Supreme Court jurisdiction to hear appeals of decisions from the high courts of the states when those decisions involved questions of the constitutionality of state or federal laws or authorities

Hmm...

- So by striking down Article 25 of **the 1789 Judiciary Act** Marshall actually *creates* the power of judicial review in the context of Marbury’s case

“necessary & proper” clause...

- What does it mean... “necessary”
- Does it mean “useful and convenient”
- Does it mean “vital and crucial”
- question of “need” v “want”

Legacy of Marbury v Madison

- **McCulloch v Maryland (1819)**
 - argument that the national bank is unconstitutional because Congress doesn’t have the power to create it
 - Marshall says they DO because of the “necessary and proper” clause

JUDICIAL REVIEW

- the power of the Supreme Court to declare legislation passed by Congress, actions taken by the President, and legislation passed by the states to be UNCONSTITUTIONAL
- it is an *invented* power of the Supreme Court

The Constitutional Context



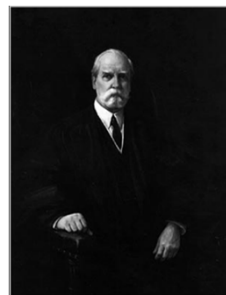
The Constitution is a *Legal* Document, but... it is an *Interpreted* Document

The Constitutional-Court Context

- ... and who interprets it?
 - The Supremes
 - **“It is emphatically the province and duty of the judicial department to say what the law is.”**
 - – Chief Justice John Marshall, *Marbury v. Madison* (1803)



The Constitutional- Court Context



- “We are under a Constitution, *but the Constitution is what the judges say it is*, and the judiciary is the safeguard of our liberty and our prosperity under the Constitution.”
- - Chief Justice Charles Evans Hughes (1908)

Over Time...

- *The text of the Constitution has changed*
- “We the People” has evolved*

Over Time...

- *Government has become more “democratic”*
- *The Justices interpreting the Constitution have changed*
- *Times and problems have changed*
- *Governmental responses & policy have changed*

Text, Times, Issues, and the Court

- Criminal Law** – capital punishment (of minors?)
- Privacy** – abortion & gay rights
- Freedom of Expression** – campaign finance
- Church-State** – school prayer
- Civil Rights** – affirmative action & voting rights
- National Power** – health care, immigration
- Presidential Power** – war on terror
- Second Amendment** – firearm regulation

**Strict Constructionism /
Textualism/Intentionalism**
v
**“Living Constitution”/Common
Law**

What does it mean to interpret?

- People with the power to interpret exert a HUGE amount of power
- EXAMPLE
 - Middle Ages and the Church
 - most people were peasants
 - their life on earth sucked...only hope was that their eternal life would be better
 - eternal life depended on the Bible
 - Priests were some of the only people who could read so the peasants had to trust the interpretation of the priests
 - the POWER was with the PRIESTS

**Strict Constructionist/
Textualism/Intentionalism**

- The Constitution should ONLY be interpreted based on the original intent of the people who wrote the Constitution (Justice Scalia)
- 14th Amendment (equal protection clause)
 - “no state shall deny to any PERSON the equal protection of the law”
 - Why was this amendment added?
 - Who were the people they were thinking about when they wrote it?

“Living Constitution”/Common Law (started in 1970s)

- The Constitution should adapt and reflect/accommodate current times (Justice Breyer)
- 14th Amendment
- judicial tyranny? legislating from the bench?

President Obama: Political & Legal Selection Criteria

- In ... hard cases, the constitutional text will not be directly on point.... In those circumstances, your decisions about whether *affirmative action* is an appropriate response to the history of discrimination in this country or whether a *general right of privacy* encompasses a more specific *right of women to control their reproductive decisions* or whether the *commerce clause* empowers Congress to speak on those *issues of broad national concern*... whether a *person who is disabled* has the right to be accommodated so they can work alongside those who are nondisabled -- in those difficult cases, the critical ingredient is supplied by what is in the Judge's heart. (statement opposing confirmation of Chief Justice Roberts)
- "In examining Judge Alito's many decisions, I have seen extraordinarily consistent support for the *powerful against the powerless*, for the *employer against the employee*, for the *President against the Congress* and the Judiciary, and for an overreaching federal government *against individual rights and liberties*." (statement opposing confirmation of Justice Alito)

Republican Presidents (and Candidates) - Political & Legal Selection Criteria

Ronald Reagan (1981-89)

- "We [will] continue to work to overturn *Roe v. Wade*."
- "the Court ruled wrongly with regard to prayer in public schools...Wasn't this a case of the Court going beyond what the Constitution actually says?"
- "[promote] equal opportunities for all Americans with no barriers born of bigotry or discrimination."

George W. Bush (2001-2009)

- "I have *great respect for Justice Scalia* for the strength of his mind, the consistency of his convictions, *and the judicial philosophy he defends*."

Mitt Romney

- "...will nominate judges in the mold of Chief Justice Roberts and Justices Scalia, Thomas, and Alito. [These] judges... will exhibit a genuine appreciation for the text, structure, and history of our Constitution and interpret the Constitution and the laws as they are written."