MEMORANDUM OF LAW
BY: Dorothy Timbs, J.D., Legislative Counsel, Robert Powell Center for Medical Ethics
DATED: February 17, 2005
RE: **Why a Law Affording Habeas Corpus Relief When a State Court Orders Denial of Food, Fluids or Medical Treatment Necessary to Sustain One's Life Fits Appropriately with Current Habeas Corpus Law**

Under the ancient writ of habeas corpus, whose suspension is forbidden by U.S. Const., art. I, sec. 9, cl. 2, a person who is in "custody" may seek relief from the federal courts alleging deprival of rights under the Constitution or federal law.

Neither Congress nor the Courts have yet definitively explained the term "custody," as the term is used in 28 U.S.C. 22411. However, several Supreme Court and lower court cases shed some light on the expansive nature of the term with respect to habeus proceedings.

In *Jones v. Cunningham2*, the Supreme Court noted that 28 U.S.C. § 2441 neither defines nor attempts to offer any means by which one might limit the bounds of the term "custody." 3 For this reason, the Court explained, it has historically looked to common-law usages of the term "custody" as well as the history of the writ in the United States and in England to better grasp the meaning of the term.4 Although the habeas corpus is most commonly used by persons held in physical custody, such as prison or jail, it has long been recognized as a "proper remedy even though the restraint is something less than close physical confinement."5 The *Jones* Court recounted cases from English Courts (under the Habeas Corpus Act of 1679, the "forerunner of all habeas corpus acts"6) to illustrate the varied uses of the writ. These cases used the writ to inquire whether a woman was being constrained by guardians to stay away from her husband against her will, to determine whether an indentured girl was assigned to a master for "bad purposes," and to allow a parent to obtain his children from the other parent, even though the children were not "under imprisonment, restraint, or duress of any kind."7 As the Court concluded,

> "Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States,

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[1] "The writ of habeas corpus shall not extend to a prisoner unless 1) he is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; of 2) he is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or 3) he is in custody in violation of the Constitution or laws or treaties of the United States …" 28 U.S.C. § 2241 (2005).
[2] 371 U.S. 236 (1963)(holding that a parolee whose terms of parole confined him to a particular community, house, and job was "in custody" for habeas purposes).
[3] *Id.* at 238.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

> although in those cases each alien was free to go anywhere else in the world. "His movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." Lower federal courts have also consistently regarded habeas corpus as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service. The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of their child, one of which we had before us only a few weeks ago. History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."8

Several years later, echoing Sir William Blackstone's sentiment that the writ is "both the symbol and guardian of individual liberty," the Supreme Court again embraced an expansive reading of the term "custody." 9 Noting that the habeas statute did not offer much insight, the Court again appealed to the common law as well as case precedent to ascertain the meaning of "custody" in 28 U.S.C. § 2241. 10 The Court, citing *Jones v. Cunningham*, stated "[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."11 Thus, the Court overruled a previous holding precluding the use of the writ to challenge a prison sentence not yet commenced and instead adopted a broader meaning of the term "custody."12

Significantly, the Supreme Court has also concluded that the term "prisoner" as it is used in 28 U.S.C. § 2241 (c) has been liberally construed to include members of the armed services.13 Lower courts have embraced this reasoning as well.14 In *Donigian*, the district court noted, "The nature of the custody considered sufficient for habeas corpus has undergone significant conceptual change."15 As the court further explained, "this notion of custody has expanded … and the writ is now looked on as a procedural device for subjecting restraints on liberty, although often short of actual physical confinement, to

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[8] *Id*. at 239.
[9] *Peyton v. Rowe*, 391 U.S. 54, 58 (1968).
[10] *Id*. at 59.
[11] *Id*. at 66.
[12] *Id*. at 67.
[13] *Schlanger v. Seamans*, 401 U.S. 487, 489 (1971)(citing *Eagles v. Samuels*, 329 U.S. 304, 312 (1946)).
[14] *Donigian v. Laird*, 308 F. Supp 449 (D.MA 1969).
[15] *Id.* at 451.

judicial scrutiny …restraints on liberty short of physical confinement can be of such magnitude as to warrant the protection of the writ of habeas corpus…"16

Just last year, the District Court for the District of Columbia analyzed whether a Navy officer was in "custody" for purposes of the habeas corpus writ. 17 The court explained that when "custody takes a form other than physical detention—for example, parole or an obligation to report for military service—it is necessary to identify as a "custodian" someone who asserts the legal right to control what is being contested in the litigation."18 In that case, the serviceman alleged that the Secretary of the Navy was his custodian. However, since the Secretary engaged in no decision-making specific to the serviceman's request for relief, in a jurisdiction where the serviceman had no contacts, the Court held the Secretary was not his custodian.19 In sum, the Secretary did not exercise the type of "real control" exercised by custodians for purposes of habeas petitions.20

Typically, an individual using the writ of habeas corpus seeks relief from detention that has resulted from criminal proceedings. However, several courts have recently recognized that the writ is available in non-criminal cases as well. 21 These cases illustrate that the writ is not solely a remedy for individuals "imprisoned" in the usual sense of the term (behind bars). To the contrary, these cases constitute a growing body of evidence that support the expansive nature of the writ of habeas corpus, as well as strong judicial sentiment that to be in "custody," one need not necessarily be incarcerated.

In light of this expansive reading of the term "custody," it is reasonable for Congress explicitly to provide that an innocent, incapacitated individual, whose wishes cannot be known with certainty, and whose very life is threatened by the removal of food, fluids, or necessary medical treatment, should be entitled to the additional layer of Due Process protection the writ was originally designed to provide. February 25, 2005

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[16] *Id.*
[17] *Blackmon v. England*, 323 F.Supp 2d 1 (D.C. 2004)(The serviceman was contesting orders to serve in Afghanistan on the grounds of being a conscientious objector and possessing a disqualifying medical condition. However, the Court held that the respondent was not the serviceman's "custodian")
[18] *Id*. at 3.
[19] *Id.* at 4.
[20] *Id.* at 5.
[21] See *Liu v. INS*, 293 F.3d 36 (2d Cir. 2001), *Chmakov v. Blackman*, 266 F.3d 210 (3rd Cir. 2001), *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002).