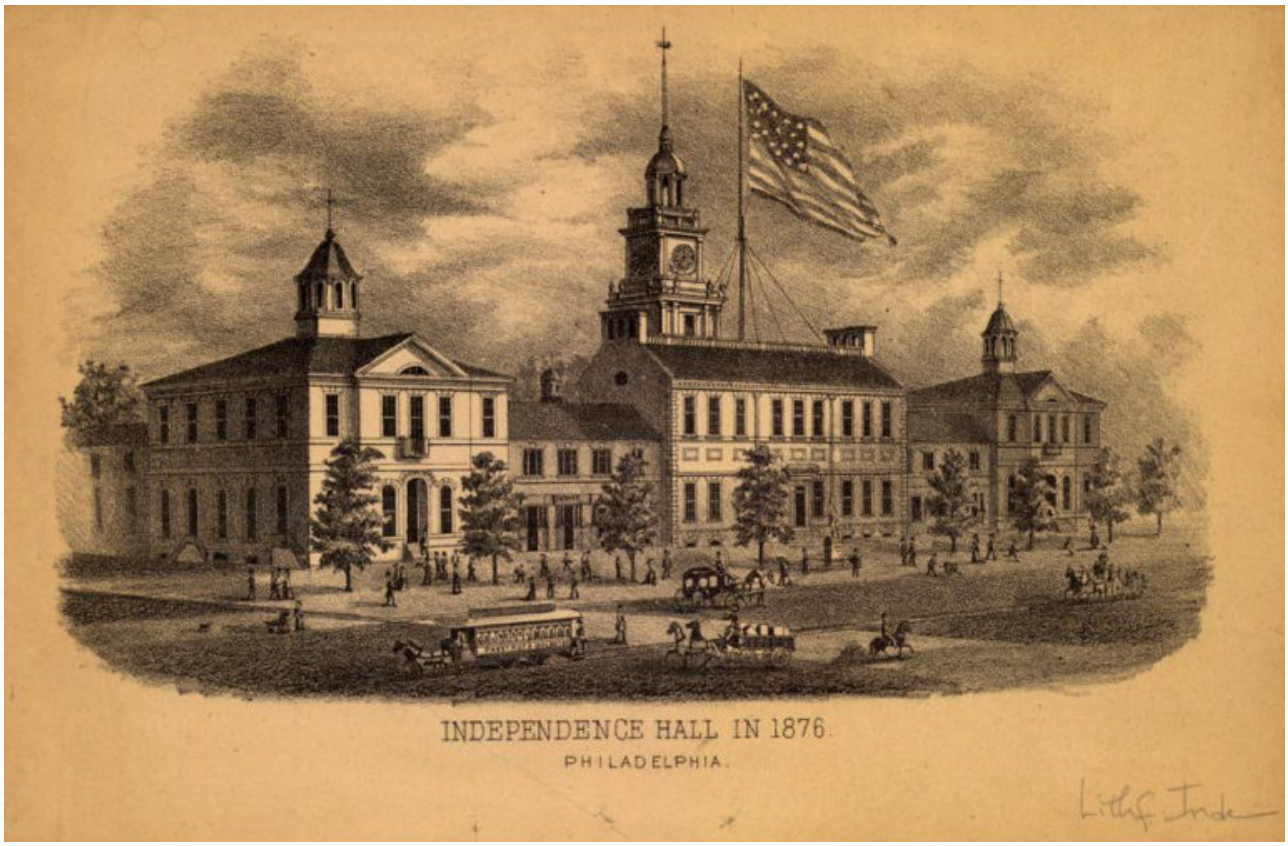
The Supreme Court Confronts History: Or, Habeas Corpus Redivivus



History matters. Perhaps more to the point, how we craft history matters, whether we are historians or not. The Supreme Court proved this on June 12 when it issued its decision in *Boumediene v. Bush*. The case concerns habeas corpus, latin for "have the body" (as in a command by a judge to a jailor to "have the body in my courtroom and explain why you are restraining him or her").
In *Boumediene*, the question at issue was whether the government could strip federal courts of jurisdiction to entertain prisoners' applications for habeas corpus. The Court broke five to four against the government, ruling that Congress had exceeded its authority. The case is sure to be a landmark. Many books will be written about it, and generations of law students will debate its merits. It will also prove the old dictum that hard cases make bad law. The issues in *Boumediene* are legion and the technical complexity formidable. Reasonable people can violently disagree on the correct legal outcomes warranted by the facts of the case.

Which is why history matters so. Both Justice Anthony Kennedy's majority opinion and Justice Antonin Scalia's dissent turn to the past to justify their interpretations of habeas corpus. In doing so, they demonstrate just how immediate the past can be—but also just how divisive it remains. Choosing between the five justices in the majority and the four in the minority is, in

essence, choosing between two very different histories.

A little should be said about the background of *Boumediene v. Bush*. The invasion of Afghanistan produced a number of prisoners of war who the administration styled "enemy combatants" and shipped off to Guantanamo Bay. Subsequent intelligence operations, without any necessary connection to the Afghan War and often conducted by American client states, produced more so-called enemy combatants who were also sent to Guantanamo. The legal challenges began almost immediately. In *Hamdi v. Rumsfeld,* decided in 2004, the Supreme Court ruled that the executive branch lacked authority to hold U.S. citizens indefinitely without a legal hearing. In *Rasul v. Bush*, decided in the same year, the Court ruled that statutory habeas corpus extended to Guantanamo Bay, despite the government's claims that the prison was not located on U.S. soil and thus was outside the federal courts' jurisdiction. Whatever the *de jure* claims Cuba might have to sovereignty at Guantanamo, no writ except the United States' runs there. It follows, the Supreme Court concluded, that habeas runs there too.

Unless, of course, Congress suspended habeas corpus. The Constitution empowers only Congress to do so, and even that power is provisional. Article I, section 9, paragraph 2—known as the "Suspension Clause"—expressly forbids Congress from suspending habeas corpus "unless when in cases of rebellion or invasion the public safety may require it." In the wake of *Hamdi* and *Rasul*, however, Congress did not suspend habeas corpus. Rather, it passed in 2005 the Detainee Treatment Act, which established procedures for review of detainees' status. In 2006, Congress passed the Military Commissions Act, which stripped federal courts of jurisdiction to consider detainees' applications for habeas corpus on the grounds that detainees were enemy combatants and therefore under the jurisdiction of military tribunals. The Court's majority opinion in *Boumediene* made this the threshold issue. Could Congress substitute military tribunals for civilian ones and effectively make an end run around the Suspension Clause?

No, said the Court, if only by the slimmest of margins. Justice Kennedy's majority opinion stakes out special ground for habeas corpus, "one of the few safeguards of liberty specified in a Constitution that," Kennedy notes, "at the outset, had no Bill of Rights." If we were to rely on the text of the Constitution alone, Kennedy's claim would be rather weak. The Suspension Clause does not grant an affirmative right to habeas corpus. It is housed in the same section in Article I that forbids Congress from, among other things, granting titles of nobility, preferring one state's ports over another's, and from meddling with the slave trade for twenty years. This is hardly the architectural design of a palisade for fundamental rights. Nonetheless, Kennedy stresses that the Suspension Clause should be regarded with special care by the courts. "In the system conceived by the Framers," Kennedy writes, "the writ [of habeas corpus] had a centrality that must inform proper interpretation of the Suspension Clause."

Such centrality is owed to the writ's history. Although Kennedy traces habeas corpus back to 1215 and the signing of Magna Carta, the keystone to his arch sits squarely with the seventeenth-century struggle between the Stuart monarchs and Parliament. The Stuarts furthered their absolutist pretensions primarily by attempting to raise revenue without Parliament, thus freeing themselves of the need to share power with a representative institution. When subjects protested, King Charles I had them jailed. When Parliament convened in 1627 (a session called precisely because Charles proved unable to tax without consulting Parliament), it presented the king with the Petition of Right, which listed executive imprisonment "without any cause" as a grievance. Charles signed the petition, but—as Kennedy would have it—"a full legislative response was long delayed." The troubles were not settled until the Habeas Corpus Act of 1679 cemented the "Great Writ" (as habeus would come to be called) into the foundations of the English constitution. Thereafter, the writ was perceived, as the great eighteenth-century jurist William Blackstone put it, as the "stable bulwark of our liberties." Kennedy leaves no doubt as to the relevance of these events. "This history," he writes, "was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power." The entire structure of the Constitution, Kennedy argues, divided powers to prevent their abuse, thus reinforcing the notion that habeas corpus was a writ to be defended by the judiciary against surreptitious attempts to subvert it by either of the other branches.

Kennedy is close to the truth here. The founding generation understood the centrality of habeas corpus and also something of the "pendular swings to and away from individual liberty." Theirs was an intellectual tradition deeply skeptical about the viability of free states. The history of republics, after all, was not an encouraging one. Revolutionary-era Americans who familiarized themselves with Walter Moyle's *Essay upon the Roman Government* or Walter Molesworth's *An Account of Denmark* had first-hand accounts of how republics fell to despots. Britain had somehow navigated a middle course in this, never adopting the excesses (and thus instabilities) of free states but maintaining enough checks on the monarch to prevent degeneration into tyranny. There was admiration enough among the founding generation for Britain's "ancient constitution," one which had worked for so long to preserve a balance between the different estates of society, thus maintaining an ordered liberty. But there was fear too, fear that the Constitution could easily be subverted by those who sought power at the public's expense. John Trenchard and Thomas Gordon's *Cato's Letters*, often cited (and cribbed) by Americans, stressed the need for vigilance in the face of such conspiracies. For the founding generation, this meant holding up the ancient constitution. And among its most important and ancient elements was the principle upon which habeas corpus rested—that government can detain a free person only when the law establishes the validity of that detention.

This history weighed on the framers who met in Philadelphia in the summer of 1787. In attempting to mix their progressive republicanism with a conservative

admiration for the British constitution, they took care to preserve many of the latter's fundamental precepts.

The framers nonetheless found themselves on the defensive in the state ratification conventions. Many Americans, it turned out, were suspicious of the powerful new national government created by the Constitution. They saw in the framers' work evidence of the same duplicity and power-mongering that had sparked the Revolution in the first place. What was this new government, cried its critics, if not the imposition of a powerful central government upon a people who had just freed themselves from the British? Why were the states being asked to cede part of their sovereignty? And where was a bill of rights? Answering this precise argument in *Federalist* no. 84, Alexander Hamilton pointed to the many protections of individual liberty in the Constitution, chief among them habeas corpus, one of the greatest "securities to liberty and republicanism" in the Constitution. The point is that the framers did not preserve elements of the ancient constitution inadvertently. They were sensitive to their peers' understanding of the place habeas corpus held in the historical imagination. It was, to the founding generation, the most ancient check on tyrannous power, the sleepless sentinel of Anglo-Saxon liberty, tracing its paternity to Magna Carta.

It should be said that the founders' views on these matters have not survived strict historical scrutiny. Historians have since demonstrated that Magna Carta was hardly a victory for abstract liberty. Its famous protections are better understood as checks on royal power in favor of the baronage. Moreover, habeas corpus's early history was less about protection of individual liberty and more about the assertion of royal authority. By prohibiting imprisonment without just cause, it empowered medieval and early-modern monarchs to intervene in the affairs of local courts. The early history of habeas is thus more connected with the development of sovereignty and power than with civil liberties.

Remarkably, Kennedy's own history is sensitive to these facts. He fully recognizes that the Great Writ cannot be traced back definitively to Magna Carta and that the writ's early history was in the service of the king rather than against him. Nonetheless, Kennedy concludes that by the seventeenth century habeas corpus had come to represent a check on the very authority that had issued it. For if the king's law extended to all corners of the realm, so too did it bind the king, and this principle eventually transformed habeas corpus into a writ that could test the legality of any detention, even one ordered by the king. What could cause such a profound change in the law? Kennedy rather impatiently concludes that "the development was painstaking, even by the centuries-long measures of English constitutional history."

We can forgive Justice Kennedy for not elucidating the mysterious procedures at work in English medieval law. More importantly, the uneven trajectory of habeas corpus from the thirteenth century through the twenty-first does not diminish its importance in Kennedy's narrative. The majority rests on the principle that the founding generation thought of habeas corpus as an eternal bulwark of

liberty, one to be guarded by the judiciary against attempts by either of the other branches to subvert it. And in *Boumediene*, the majority makes clear that they are the heirs to that historical principle.

The dissenters offer a competing narrative, one of war and executive power. Justice Antonin Scalia puts it rather succinctly in the first section of his opinion: “America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dharan, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen.” On September 11, continues Scalia, “the enemy brought the battle to American soil.” They fight our troops in the field and threaten future attacks. One need only “board a plane anywhere in the country, to know that the threat is a serious one.” Scalia leaves no doubt about where he stands on the magnitude of the majority’s opinion, which “will make the war harder on us. It will almost certainly cause more Americans to be killed.”

Scalia’s undisguised rage continues unabated throughout his twenty-five-page opinion. Oddly, given Scalia’s penchant for originalism (or the idea that the Courts’ interpretations should be consistent with the framers’ *original* intent), his interpretation of the history of the Suspension Clause is rather weak. It amounts to the dual claim that when the framers did their work, the common law writ of habeas corpus did not run outside the king’s sovereign territory and was never intended to be extended to aliens abroad. He likens Guantanamo Bay to eighteenth-century Scotland. There, English courts had no jurisdiction in matters of habeus corpus. And the British government used this loophole, much like the Bush administration uses the “enemy combatant” designation, to arbitrarily imprison its Scottish enemies. Scalia also points to the absence of any case in English history where a prisoner of war requested a writ of habeas corpus, let alone had one granted. “The text and history of the Suspension Clause,” he concludes, “provides no basis for [U.S. court’s] jurisdiction” in Guantanamo.

Technical merits of his opinion aside, Scalia’s use of history is an utter failure. His narrative of the present war glibly subsumes Sunni and Shiite rebels, Al Qaeda and its many loose affiliates into one singular “enemy.” By including the 1983 Beiruit barracks bombing—perpetrated by a Shia militia formed in the wake of Israel’s 1982 invasion of Lebanon with no connection to Al Qaeda—with these other attacks, he not only suggests that the current war has been going on much longer than most Americans (including most in the government) realize but, more outrageously, that our’s is a war of civilizations. It is America against all who hate us—and they all happen to be Arab. But never mind all of this. Scalia’s legal history is also troubling. Consider the Scotland/Guantanamo analogy, which actually weakens Scalia’s argument. As any card-carrying originalist should know, the constitutional position of Scotland was a matter of grave concern for colonists who watched the English parliament strip Scots of, among other things, the right to bear arms. The founders—former English subjects who, much like the Scots, resided in

the British provinces—would doubtless be puzzled if told that the reach of habeas corpus could extend no further than the British had allowed it in 1789.

Despite its intellectual flimsiness, Scalia's narrative is the more viscerally powerful. Its Cassandra-like prophesizing of future violence rouses our deepest fears. Its invocation of American blood spilled on American soil stirs our rage. And its simplicity satisfies, even if deceptively so. But this speaks to the opinion's persuasiveness, and the ultimate measure of that will be whether Scalia has touched the right nerve with Americans. Kennedy's narrative is more nuanced and complex. But the price of complexity may well be fragmentation. How can historical complexity compete with the nineteenth-century faith in steady, indomitable progress or with the eighteenth century's pervasive fear of conspiracy and tyranny? Habeas corpus played a heroic role in both narratives, and that gave the writ a powerful legitimacy.

No historian should, of course, return to writing such intellectually untenable histories. Nonetheless, we would do well to review the power that narratives have to ascribe meaning. Habeas corpus would not have been enshrined in our Constitution were it not for the founding generation's conviction that it was the bedrock of civil liberty and had been so since time immemorial. Subsequent historical investigation proved their view fanciful, but this did not deter Justice Kennedy from crafting a new narrative to explain the majority's safeguarding of habeas corpus against congressional attempts to subvert it. His narrative is not as grand, nor as simple, as those of the founding generation. But it is credible. It is a history that recognizes the complexities of the past and avoids the crass simplicities and violent elisions present in Justice Scalia's use of history. That the Supreme Court has deployed Kennedy's narrative to check congressional expansion of executive power in the midst of the Bush Administration's "War on Terror" is no small matter. And a reminder of how much history matters.

Further Reading:

The legal scholar Robert Cover makes the argument that every prescriptive legal norm requires a narrative to explain and legitimate it. See his "Foreword: Nomos and Narrative," *Harvard Law Review* 97 (November 1983). On the subject of history and historical thinking in the eighteenth and nineteenth centuries, see Caroline Robbins, *The Eighteenth Century Commonwealthman* (Cambridge, 1959); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967); Gordon S. Wood, "Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century," *The William and Mary Quarterly* 39 (July 1982); and Joyce Appleby's collected essays, *Liberalism and Republicanism in the Historical Imagination* (Cambridge, 1992). On habeas corpus, see John Baker, "Personal Liberty under the Common Law of England, 1200-1600," in R. W. Davis, ed., *The Origins of Modern Freedom in the West* (Stanford, 1995) and Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," *Virginia Law Review* (forthcoming).

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