Habeas Corpus Past and Present

By Eric M. Freedman

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

—James Madison, *The Federalist*, No. 51

Habeas corpus is first and foremost a symbol of this political creed. Only secondarily is it a legal procedure. It signifies that all persons are entitled to be at liberty unless and until the government can demonstrate by a fair process to a neutral decision-maker the factual and legal right to imprison them. More generally, the "Great Writ of Liberty" betokens that no government action is legitimate unless consistent with the requirements of law.

In the mundane world of public affairs, mortals acting under the influence of the perceived exigencies of the moment sometimes abandon these ideals and act in heat, damaging important public values.[1] Habeas corpus proceedings are a tool for reconsidering those actions coolly and making needed repairs. But the tool does not do the work; the worker does—or does not.

Consider some recent events. In *Boumediene v. Bush*, 553 U.S. 723 (2008), a ruling that will take its place beside the Steel Seizure case as a monument to American liberty, the Supreme Court held that people whom the United States had imprisoned at Guantanamo Bay were entitled to use habeas corpus to test the bases of those imprisonments notwithstanding the effort of Congress to eliminate that remedy.[2]

Since then the D.C. Circuit ("which includes some judges who do not bother to hide their hostility to the Supreme Court," Adam Liptak, *The "Fill in the Blanks" Game of Indefinite Detention*, N.Y. Times, Dec. 13, 2011, at 19) has engaged in massive resistance. The court has essentially nullified *Boumediene* by creating two impregnable barriers to prisoners' release.

First, as to the lawfulness of imprisonments, the court has—in flat defiance of history (*see,* e.g., Jared Goldstein, *Habeas Without Rights*, 2007 Wisc. L. Rev. 1165–1223)—erected an insuperable series of evidentiary presumptions in favor of the government. *See,* e.g., *Latif v. Obama,* 2011 U.S. App. Lexis 22679 (D.C. Cir. Oct. 14, 2011) (No. 10-5319). As of early November 2011, the D.C. Circuit Court had heard 16 cases involving detainees. Of the six that had resulted in petitioners' victories, the court reversed all six, regardless of the credibility findings of the district judges. Of the 10 that had resulted in victories for the government, the court affirmed eight and remanded two. In short, no Guantanamo habeas petitioner has satisfied the D.C. Circuit that he is entitled to relief. *See* Petition for Writ of Certiorari, *Almerfedi v. Obama*, No. 11-683, at 24 (filed Nov. 7, 2011).

Second, as to the remedy, even if all the detainees had overcome the first barrier and persuaded the court that there was no legal basis for their imprisonment, under the law that the circuit has devised, they would have won nothing.[3]

In *Boumediene*, the Supreme Court wrote, "We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." 553 U.S. at 787.

In the D.C. Circuit, however, to issue an order directing a prisoner's release is to infringe upon executive prerogative. Thus, in *Kiyemba v. Obama*, 553 F.3d 1022 (D.C. Cir. 2009), confronted with petitioners against whom the government conceded that it had no claims of wrongdoing what-

soever, the court wrote, "The government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners, and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more." *Id.* at 1029.

This conclusion is not only at odds with what the Supreme Court wrote in *Boumediene* in 2008 but also with what the Court did in the celebrated *Amistad* case of 1841. In 1839, slaves aboard the Spanish vessel *Amistad* killed two crew members and ordered the survivors to head for Africa.[4] Instead, the sailors landed the ship in the United States. The executive branch insisted that pressing considerations of international relations required that the slaves be handed over to Spain. Arguing pellucidly to the Supreme Court for their release, John Quincy Adams, the now-aged former President who had used a law book rather than a bible for his swearing-in, both rebuked the administration for its abandonment of "all the most sacred principles of law and right, on which the liberties of the United States are founded" and warned the Court that it faced a challenge to "the power and independence of the judiciary itself." Indeed, he told the tribunal, if it did not grant release, the effect would be to "disable[] forever the effective power of the habeas corpus."[5]

In an opinion issued within weeks of Adams' argument, Justice Story ruled that the slaves "be declared to be free, and be dismissed from the custody of the court, and go without day." *The Amistad,* 40 U.S. (15 Pet.) 518, 597 (1841). Having successfully litigated for their freedom, these alien killers, who had been brought into the United States involuntarily and remained here in defiance of the wishes of the President, lived and spoke freely in various states until they returned to Africa.

The D.C. Circuit's abdication of its prescribed role is thus built upon a thoroughly ahistorical theory of executive supremacy. For the President or the Congress to act unlawfully is to exceed the authority granted by the people.[6] For the judiciary to review the actions of those branches is to exercise authority granted by the people and does not require the permission of the other branches.[7] In employing the writ of habeas corpus to implement this understanding, the judiciary not only honors the original purpose of the writ—to ensure that those exercising power do so lawfully—but also strengthens the structure of checks and balances that this country has built since it declared its independence from England to serve the same purpose.[8]

The circuit judges' rationale for their judicial hara-kiri seems to be that to inspect seriously the Potemkin village of classified knowledge the government all too often constructs to justify its actions retrospectively, however mistaken it now knows they were, is to impermissibly "second-guess the Executive." Actually, it is to engage in judicial review.

The Supreme Court has not recently issued a reminder to this effect, perhaps as a result of the adventitious disqualification of Justice Kagan from many of the cases. But that hardly excuses the court of appeals. If it persists in its current conflation of separation of powers with checks and balances, its next holding will doubtless be that habeas corpus is unconstitutional.

The purpose of insisting that the executive branch's decision-making conform to criteria of reliability is not to aggrandize a particular branch but to benefit the public by "[r]ecognizing the realities of human fallibility and the dangers both to individuals and to society at large when government errs."[9]

Habeas corpus served exactly that function two centuries before our Constitution created a government of checks and balances.[10] The Glorious Revolution, long celebrated for constraining royal power by law, was born in the midst of a national security crisis. In December 1688, the Catholic James II of England, having lost all political support, fled the kingdom and was succeeded by William and Mary. But James (who had also been king of Ireland and Scotland, where he retained many supporters) mounted a re-invasion, landing in Ireland in March 1689. His allies won a battle in Scotland in July and were not subdued for several months as fears of a possible supporting invasion from France mounted. He was defeated at

the Battle of Boyne in Ireland that same month and fled for the last time, but open warfare persisted into fall 1691. Meanwhile, "there were plenty of Jacobites in England who could not foreswear their allegiance to the man they considered their divinely anointed king. Rebellion seemed imminent, especially when so many were arrested for printing seditious libels, for conspiring against the king and queen or for being priests—or worse, Jesuits."[11]

When the judges (appointed mainly by William and hence unlikely to have any sympathy for his rival) examined 147 such cases on writs of habeas corpus in 1689–1690, they found that 20 percent of the prisoners "posed a danger known to the law" and should therefore be remanded for trial on criminal charges.[12] But in the remaining 80 percent of the cases, a closer look at the suspicious circumstances—such as an ill-timed trip to France or Ireland—showed that "many men and women had been jailed on the thinnest evidence or caught in indiscriminate trawls for suspects," and they were released.[13]

Surely the judges of the D.C. Circuit do not believe that the criminals of al-Qaeda pose a greater existential threat to the United States than the armies of James II did to the regime of William and Mary. But the circuit judges have not learned the wisdom of Benjamin Franklin. "There is not in any volume, the sacred writings excepted, a passage to be found better worth the veneration of freemen than this: 'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.'"[14]

The roadblocks confronting the Guantanamo prisoners should bring to mind another lesson of the past. Relying on a single legal remedy denominated habeas corpus to keep government power in check is a dangerous concentration of eggs in a single basket.[15]

In February 1814, during the War of 1812, Justice Arthur Livermore of the New Hampshire Supreme Court issued a writ of habeas corpus to Captain Isaac Hodsdon, commander of the U.S. Army post at Stewardstown, N.H., to produce the bodies of Charles Hall and Sanders Welch Cooper, who both claimed to be U.S. citizens detained by Hodsdon and whose lawyers had filed a petition for them.

Livermore acted on the basis of various supporting affidavits. One, from a local judge, reported that Hodsdon had been summarily detaining those he suspected of wrongdoing. The judge continued, "I remonstrated with said Hodsdon against such unreasonable arrests. Said Hodsdon observed that he was acting under the authority of the United States and that he should continue to arrest all such persons as said or did anything disrespectful to the army or the laws." The judge complained that "the conduct of those now commanding the military post at that place is such as to make the civil wholly subservient to the military law." Another supporting affidavit, from one Austin Bissell, recounted how he had been seized without charges the previous month, imprisoned in the fort, and then just as abruptly released a few days before the petition was filed.

In a letter to the court, Hodsdon, who had been sent to the post with strict orders to interdict the widespread trading with the enemy taking place across the Canadian border, responded that he would not produce his two prisoners. Hall, a Canadian, was being held as a prisoner of war at the Army barracks at Canaan, Vt., and "will probably remain at that post until the pleasure of the President of the United States is known touching that point. As the civil authority takes no recognizance of prisoners situated like him, I deem it inconsistent with my duty to deliver him into the hands of a civil officer." Cooper was also under arrest at the Canaan barracks on a well-founded suspicion of having furnished provisions to the enemy, and he was being held pending prosecution on federal criminal charges.

The petitioners were soon released from prison, but Hodsdon's disobedience generated a dozen years of legal activity.

The New Hampshire courts considered Hodsdon's letter contemptuous, less because the prisoners had been moved to Vermont just ahead of the writ than because Hodsdon was deciding the legal and factual issues for himself rather than submitting them to judicial adjudication. Hodsdon was arrested for contempt and prosecuted criminally by both the state and private parties. Those cases were eventually dropped after he filed a petition to the New Hampshire legislature. The petition contained an outright falsehood but succeeded in procuring him a special act untangling some procedural snarls. Hodsdon was also sued successfully for damages by both Cooper and Bissell and paid those judgments. Subsequently, Hodsdon persuaded Congress (to which his lawyers had been elected) that his legal positions had been taken in good faith, and it ordered his reimbursement.

Whatever the appropriateness of this particular outcome, it emerged from a legal system that had multiple and mutually reinforcing mechanisms to assist habeas corpus in curtailing abuses of power. Many of these mechanisms have suffered corrosion in the intervening years, partially because of the relatively weak position of the federal judicial branch in the early republic and partially because of limitations on state authority created in the decades around the Civil War. The power of state courts to police federal officers has been largely eliminated. Criminal prosecution of public officials has become almost exclusively a function of government prosecutors. The task of defining the contours of private remedies consisting of damages for misconduct by public officers (through doctrines like immunity and supervisory liability) has been taken from juries and passed to career legislators. And the Supreme Court has shown greater and greater creativity in devising barriers to private damages liability under any circumstances. *See,* e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Without indulging in misplaced nostalgia, we would do well to be guided in the future by a teaching of the past that continues to accord with common sense: the existence of belt-and-suspenders systems for constraining the government multiplies the probabilities of success. If the judges of the Fourth and Fifth Circuits had behaved after *Brown* as many of the judges of the D.C. Circuit have behaved after *Boumendiene*, school desegregation would have been delayed for agonizing additional decades. But it still would have come. Southern school systems were subject to too many converging legal pressures generated

by executive, legislative, and private actors for the states to persist in their misconduct.

Those actors needed legal tools to accomplish their work. But, as with habeas corpus, the indispensable factor in the enforcement of constitutional rights was the political will that drove the workers, not the details of the tools.

So we return to the ultimate teaching of the history of habeas corpus: Its long-term efficacy as a device to defuse popular passion depends on the ineluctable reality that the politically active majority will ultimately get the Constitution it wants.[16] Habeas corpus will be a meaningful legal mechanism only for as long as it indeed represents the aspirations of the body politic for a government under law.

We would be wise to remember the words of Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."[17] **TFL**

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Endnotes

[1]*See* Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?* 17 Cr. Just. 14, 15 (2002) (listing some examples in American history).

[2]That effort thereby became the first congressional statute ever invalidated under the constitutional prohibition on suspension of the writ of habeas corpus, U.S. Const., Art. 1, sec. 9, cl. 2 ("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.").

[3]As of April 2009, when the district judges had determined in 24 cases that there was no legal basis for detention, 21 of the "winners" remained at Guantanamo. *See* Petition for Writ of Certiorari, *Kiyemba v. Obama*, No. 08-1234, at 1 n.1 (filed April 3, 2009).

[4]For a succinct and vivid account of the *Amistad* episode, see Donald Dale Jackson, *Mutiny on the Amistad*, 28 Smithsonian 115 (1997).

[5]A slightly condensed text of the argument—evocative throughout of events of this decade—appears along with an account of the case in *The* Amistad *Odyssey*, in And The Walls Came Tumbling Down: Closing Arguments That Changed the Way We Live 61, 87 (Michael S. Lief and H. Mitchell Caldwell, eds., 2004). The material quoted in the text may be found on pp. 98 and 100.

[6]*See The Federalist*, No. 78, at 466–468 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (explaining judicial review on this basis).

[7]*See Boumediene*, 553 U.S at 765–766 ("[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–537 (2004) ("[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge.").

[8]*See Boumediene*, 553 U.S. at 743 (Separation of powers "serves not only to make Government accountable but also to secure individual liberty.").

[9]Eric M. Freedman, *A Rational Constitutional Faith*, 33 Hof. L.R. 417, 420 (2004). *See also* Eric M. Freedman, *Who's Afraid of the Criminal Law Paradigm in the "War on Terror"?* 10 N.Y.C. L.R. 323, 327 (2007) ("[O]ne purpose of due process is to insure simple accuracy.").

[10]This and the following paragraph are taken from Eric M. Freedman, *Habeas Corpus as a Common Law Writ*, 46 Harv. C.R.-C.L. L. Rev. 591, 615 (2011), where they appear in heavily footnoted form.

[11]Paul D. Halliday, Habeas Corpus: From England To Empire 134–135 (2010). It may also be worth recalling that, early in the century, there had indeed been a plot engineered by some Catholics to blow up the opening day of Parliament with 39 barrels of gunpowder.

[12]*See* Paul D. Halliday and G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 627 (2008).

[13]*See* Halliday, *supra* note 11, at 135. Interestingly, when the U.S. military, acting through tribunals that applied basic due process norms, reviewed the cases of 1,196 detainees captured during the Persian Gulf War, it found that 310 (26 percent) of them were legitimately held as prisoners of war, with the remainder (74 percent) entitled to refugee status. *See* Dep't. of Defense, *Conduct of the Persian Gulf War: Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991* (Public Law 102-25) App. L. at 577 (Apr. 1992).

[14]William Temple Franklin and Benjamin Franklin, Memoirs of the Life and Writings of Benjamin Franklin 270 (1818).

[15]The story that follows is based on research that I have conducted in the New Hampshire State Archives. It will be published formally as part of a forthcoming law review article entitled *Habeas Corpus as a Legal Remedy*, which will also elaborate on the broader developments discussed in the text.

[16]*Cf.* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 Sup. Ct. Rev. 301, 332–333 (describing Madison's skepticism that any constitutional guarantee against suspension of the writ could withstand an intense burst of public alarm).

[17]Learned Hand, *The Spirit of Liberty*, in The Spirit of Liberty: Papers and Addresses of Learned Hand 190 (Irving Dilliard, ed., 3d. ed. 1963).