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Habeas Corpus Barely Saved **by Sheldon Richman**

Once in a while the fading embers of freedom flare with defiant vigor. That happened the other day when the U.S. Supreme Court sternly informed the Bush administration that it may not hold people suspected of being terrorists indefinitely without charge and without judicial review at its prison at Guantanamo Bay, Cuba.

In a too-close-for-comfort 5-4 ruling, the Court reminded the American people — indeed, the world — that arbitrary power destroys individual liberty. Where government can lock people up and throw away the key — answerable to no one at all — there liberty does not dwell. That is what the Bush administration has aspired to, but last week the Court drew a line.

In invoking the cherished principle of habeas corpus, the Court was emphatic: “Protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.... The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”

To be sure, the Constitution permits *Congress* to suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.” But the Court said that the Suspension Clause was not satisfied by the Military Commissions Act of 2006 (MCA), Section 7 of which forbade any court from considering a petition for a writ of habeas corpus for “an alien detained by the United States who has been determined by the United States [i.e., the Bush administration] to have been properly detained as an enemy combatant or is awaiting such determination.” (John McCain was a key mover behind the MCA.)

If you missed this very big news story, it’s probably because television was too busy covering floods, gas prices, and the death of a beloved network newsman. With all that, the news outlets didn’t have time to explain that the High Court just barely put a stop to one of history’s most nefarious forms of tyranny: arbitrary and indefinite incarceration. Yes, the now- stricken Section 7 applied only to aliens. But given this administration’s horrifying civil-liberties record — national-security letters, signing statements, extraordinary rendition, warrantless eavesdropping,

mass data gathering, torture — could we really be confident that U.S. citizens wouldn't be next to lose habeas-corporis rights?

The Court's ruling does not mean anyone will be freed from Guantanamo. That will require separate case-by-case proceedings. All the justices said is that the government may not imprison someone without charge or trial and it may not forbid him from contesting his detention before a judge. This is what Bush et al. attempted to do. They shamelessly tried to set up a system in which kangaroo courts could brand suspects "enemy combatants," after which they might be held incommunicado for the duration of an endless and ambiguous "war on terror."

That this administration would even entertain the thought of doing that demonstrates a level of cynicism and disdain for hard-fought principles of freedom that should make us shudder. The next time President Bush and his band of rogue operatives pontificate about democracy and freedom, remember what they tried to get away with here. And say a silent thank you to Justices Kennedy, Stevens, Souter, Breyer, and Ginsburg. Then think about Chief Justice Roberts and Justices Scalia, Thomas, and Alito — and the political hacks who put those men in a position to destroy a sacred principle of liberty that, if we date it from the signing of the Magna Carta on June 15, 1215, just hit its 793th anniversary. (I thought conservatives treasured the old, tried-and-true precepts.)

Justice Kennedy's [opinion](#) is worthwhile reading for every American, since it is a timely reminder of our libertarian heritage. Besides providing a detailed history of habeas corpus, it patiently explains why this principle is critical to limiting the always dangerous power of government so that liberty might be secured. Parents may find that reading those sections of the opinion to their children is a fine way to spend part of the Fourth of July. I wouldn't count on kids' learning these lessons any other way.

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