



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Habeas Corpus Barely Saved **by Sheldon Richman**

Once in a while the fading embers of freedom flare with defiant vigor. That happened in June 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 Guantánamo 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 in June 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.

The Constitution does not distinguish between citizens and noncitizens when it talks about “privileges.” 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, 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.)

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 corpus privileges?

The Court's ruling does not mean anyone will be freed from Guantánámo. That will require separate case-by-case proceedings. All the justices said is that the government may not imprison someone on territory it controls (such as Guantánámo) without charge or trial or forbid him to contest his detention before a judge. That 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 these men in a position to destroy a sacred principle of liberty that, if we date it from the signing of Magna Carta on June 15, 1215, has hit its 793rd anniversary. (I thought conservatives treasured the old, tried-and-true precepts.)

But doesn't Guantánámo hold terrorists? Maybe. But at this point they are merely suspects; their guilt of wrongdoing has not been proved in a proper court. At any rate, it's far from clear that everyone in the prison is a terrorist. They were not all apprehended on an active battlefield. As the *New York Times* reported,

The man who gave the case its title, Lakhdar Boumediene, is one of six Algerians who immigrated to Bosnia in the 1990's and were legal residents there. They were arrested by Bosnian police within weeks of the Sept. 11 attacks on suspicion of plotting to attack the United States embassy in Sarajevo — "plucked from their homes, from their wives and children," as their lawyer, Seth P. Waxman, a former solicitor general, put it in the argument before the justices on Dec. 5. The Supreme Court of Bosnia and Herzegovina ordered them released three months later for lack of evidence, whereupon the Bosnian police seized them and turned them over to the United States military, which sent them to Guantánámo.

Other suspects also ended up in U.S. custody under dubious circumstances. For example, after 9/11 the U.S. government offered cash rewards in Saudi Arabia and elsewhere to people who turned in persons suspected of terrorism. Such a method of identifying threats is tainted, to say the least.

Habeas corpus and liberty

The Court majority was emphatic in its view that habeas corpus is essential to the separation of powers, which in turn is essential to the prevention of tyranny:

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. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system....

This history 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 Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty....

The Court went on:

The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty.... The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.... The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause....

[The] writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers....

But what about safety in a dangerous world? Aren't extraordinary powers needed by government at times like these? The Court doesn't think so:

Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Justice Kennedy's opinion (<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=06-1195>) 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.

In his dissent Justice Scalia emphasized that "America is at war with radical Islamists.... Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq." He asserts that habeas corpus has never been extended to enemy combatants held outside the United States. But in so arguing, Scalia is paying ominous deference to the arbitrary decrees of the executive branch. This has the effect, as the majority points out, of undermining the checks and balances that are so often the subject of conservative lip service. The so-called war on terror is unlike other wars: the administration has declared the entire world the battlefield, and the designated enemy — terror — is not another nation or even an organization but a method of fighting. Thus this alleged war is in fact an endless crusade across the globe against anyone the administration *declares* a terrorist — whether or not the suspect's targets are American.

That suspects could be held for the duration of such a "war" — subject to torture — should offend every advocate of individual liberty.

*Sheldon Richman is senior fellow at The Future of Freedom Foundation, author of **Tethered Citizens: Time to Repeal the Welfare State**, and editor of [The Freeman](#) magazine.*

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