SYMPOSIUM

The Legacy of the Magna Carta in Recent Supreme Court Decisions on Detainees' Rights

Robert Pallitto, *Seton Hall University*

The legacy of the Magna Carta is apparent in the Supreme Court's recent decisions regarding detainees' rights. Asked to evaluate strong claims of executive power, the Court has had occasion to consider the origin and scope of habeas corpus, which many scholars see as a product of the Magna Carta. The majority opinion in *Boumediene* v. *Bush* (2008) traced the history of the writ of habeas corpus back to the Magna Carta and relied on that lineage to rule that Guantanamo detainees were entitled to petition for habeas corpus, even though Congress had explicitly denied them that right in the 2006 Military Commissions Act (MCA) and the 2005 Detainee Treatment Act (DTA).

By holding that habeas corpus trumps statutory law, the Court affirmed the central place of the writ in our modern conception of individual liberty. At the same time, the Court itself (by allowing lower courts to hear and decide detainees' habeas petitions) has assumed a key role in protecting individual liberty when the political branches have been unwilling to do so. Thus, the Court's role in making the writ available works as a crucial counterforce against state power at a time when "national security" is used to justify secret detention, detention without criminal charges, and torture.

THE PRESIDENT AND THE SUPREME COURT IN THE "WAR ON TERROR": A BRIEF HISTORY

In the aftermath of the terrorist attacks of September 11, 2001, a struggle ensued between the Bush administration and the Supreme Court over the legal limits of state force applied in the administration's "war on terror." Each time the Court invalidated or restrained executive policies and practices, the administration sought ways to continue them. This history is worth reviewing briefly. Following September 11, the administration began detaining people suspected of being linked to terrorist organizations. Detention took place both within the United States and abroad, even though there were often no criminal charges pending or intended against the detainees. The first major test of this practice arose in the case of *Hamdi* v. *Rumsfeld* (2004), which reached the Supreme Court when Hamdi, a U.S. citizen, challenged his detention at Guantanamo Bay. The administration argued that they were authorized to detain Hamdi without charges for the duration of the war on terror, and that the Authorization for Use of Military Force, which Congress passed in September of 2001, furnished the legal authority for detention. The Court upheld Hamdi's detention, finding that the detention of persons seized on the battlefield is incident to the waging of war. However, Justice O'Connor warned that "the state of war is not a blank check for the executive" (*Hamdi* v. *Rumsfeld* 2004, 535), and the Court required certain procedural protections to be afforded to detainees in Hamdi's position, including access to counsel and a status hearing to ensure their initial proper classification. Shortly thereafter, the Court decided that procedural protections specified by statute were applicable to detainees, including noncitizens, in *Rasul* v. *Bush*.

Following the decisions in *Hamdi* and *Rasul*, the administration sought to foreclose judicial review of detainee cases, and, to that end, they successfully lobbied Congress to pass the DTA. This act purported to strip the federal courts of jurisdiction to hear habeas corpus petitions brought by detainees. Of course, habeas relief was the only means available to many of the detainees for challenging their confinement—they could not use direct appeals because they had not been convicted or even charged with an offense, so they had nothing to appeal. Thus, the jurisdiction-stripping provisions of the DTA would close off detainees' access to the courts entirely.

In 2006, the DTA was challenged by a petitioner who actually had been charged with a series of offenses when his case of *Hamdan* v. *Rumsfeld* reached the Supreme Court. Hamdan had been slated to be tried by a military tribunal, and he argued that the tribunal in his case, which was constituted according to President Bush's military order of November 13, 2001, was unlawful. In *Hamdan*, the Supreme Court first found that the DTA did not preclude Hamdan's challenge, because that challenge had been lodged prior to the passage of the DTA. Turning to the merits of the case, the Court invalidated the military tribunals constituted by the president's 2001 order, finding them in violation of the Uniform Code of Military Justice, the Law of War, and the Geneva Conventions (*Hamdan* v. *Rumsfeld* 2006, 557, 622–34). In other words, the Court interpreted previously existing positive law to provide greater procedural rights for detainees than the executive was allowing them. However, President Bush sought to circumvent the *Hamdan* ruling by approaching Congress once again for new authorization to use military tribunals of the kind he had created in 2001. Late in 2006, before the Congress shifted to Democratic control, he obtained that approval. The MCA reauthorized the tribunals that the Court had invalidated earlier in the year.

In 2008, another Guantanamo detainee challenged the administration's claim that he was not entitled to habeas corpus. Bush administration lawyers argued in *Boumediene* v. *Bush*

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that the petitioner was not entitled to habeas corpus for two reasons: because Guantanamo Bay was part of the sovereign nation of Cuba and therefore beyond the reach of the U.S. Constitution, and because the 2006 MCA foreclosed court review of detainee status. The Court rejected both of the administration's claims, noting that the Guantanamo facility was, in fact, under the control of the United States, and that habeas corpus could not be foreclosed without a specific and appropriate formal suspension of the writ by Congress in accordance with its Article I suspension power.

In *Boumediene*, the Court emphasized the importance of the writ of habeas corpus as a check on executive power. Writing for the Court, Justice Kennedy explained the Court's role in protecting petitioners against state force. "The test for determining the scope of this provision," he wrote, "must not be subject to manipulation by those whose power it is designed to restrain" (*Boumediene* v. *Bush* 2008, 2259). *Boumediene* proved to be the Court's last major ruling on detainee status and habeas corpus under President Bush.

Incoming president Barack Obama indicated almost immediately upon taking office that he would reverse Bush's policy on detention and either try or release the detainees. On January 22, 2009, Obama issued an executive order stating that the detention facility at Guantanamo Bay would be closed within one year, and that the Attorney General would coordinate a review of all Guantanamo detainees. The order also acknowledged that all detainees have the right to file a habeas corpus petition. This last provision was significant, because it showed that the new administration would not seek to contest or limit the *Boumediene* ruling.

HABEAS CORPUS AND THE MAGNA CARTA

The Supreme Court made the link between habeas corpus and Magna Carta explicit in its *Boumediene* opinion. Tracing the history of the writ back to the 1215 agreement between King John and his barons, the Court explained that the right to inquire into the basis of one's confinement is basic and fundamental to the rule of law. The Magna Carta "decreed that no man would be imprisoned contrary to the law of the land" (*Boumediene* v. *Bush* 2008, 2244). This general guarantee did not immediately function to guarantee individual liberty, however. First, it did not come with an enforcement mechanism, so executing the decree was problematic. Moreover, habeas corpus was at first typically used by the king to ask why one of his subjects was being detained; this is strikingly different from contemporary use, subject as it is to the inclinations of the monarch and augmenting rather than constraining his power (*Boumediene* v. *Bush* 2008, 2245). Gradually, however, habeas corpus was used to require the king himself to explain why he had detained a person. In *Boumediene*, the Supreme Court read the history of English law to say that "gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled" (2244).

The Court went on to point out that the framers of the U.S. Constitution did, in fact, include an express guarantee of habeas corpus in the Article I enumeration of legislative powers. As Justice Kennedy explained,

> 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 monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system. (*Boumediene* v. *Bush* 2008, 2244)

Article I, Section 9, clause 2 of the U.S. Constitution states that "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." In the DTA and MCA, Congress had not actually suspended the writ, but rather foreclosed its availability to a specific group of detainees. This was not a formal suspension. Moreover, the Court did not find the review proceedings that were intended to substitute for habeas relief to be an adequate substitute, and, consequently, the Guantanamo detainees were found to be protected by the Suspension Clause. In practical terms, the ruling meant that detainees were entitled to petition the federal courts for habeas corpus relief, which could lead to their release from confinement.

HABEAS CORPUS AS A META-PRINCIPLE

From 2004 to 2008, the Supreme Court invalidated, first, a military order of the president, then an interpretation of statutory language advanced by the executive, and finally an act of Congress itself. The rulings imposed a check on the executive and specifically vindicated habeas corpus as a limitation on the executive power to detain individuals during wartime. What should we make of this course of events? Of course, the Bush administration was sharply critical of the decisions that repudiated its antiterror policies and, more broadly, repudiated its executive authority. But this conflict between the Court and the other branches also raises a familiar yet fundamental question of democratic theory: does Supreme Court policymaking threaten the democratic process? By invalidating an act of Congress that was approved by a majority of lawmakers and signed into law by the president, the Court essentially substituted a minority view for the democratically enacted majority view. In so doing, were the unelected and unaccountable members of the Court endangering democratic values? Robert Dahl posed this problem a half-century ago, stating that "no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems" (1957, 283).

Dahl answered his own question by noting that an average of two justices are replaced during each presidential term, so that a one-term president (and certainly a two-term president) could expect to shape the Court over time to fit his preferences and, by extension, the preferences of the electorate (1957, 284). Moreover, Dahl analyzed the 86 decisions in which the Court actually had invalidated acts of Congress, and he concluded that despite that record, the Supreme Court did not act as a hindrance to the lawmaking majority. "It is an interesting and highly significant fact," Dahl concluded, "that

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Congress and the president do generally succeed in overcoming a hostile Court on major policy issues" (288). Thus, for Dahl, the potential threat to democratic values had not actually materialized in the United States. In the "war on terror" decisions previously cited, however, it does appear that the Court effectively blocked the political branches on the "major policy issue" of detainee treatment. In short, Dahl's question remains and requires an answer today that addresses the developments of the past decade. Significantly, the complaints of executive overreach following September 11 were numerous, and those complaints have brought a greater urgency to questions concerning the tension between rights and democracy and the role of the Supreme Court in overturning democratically enacted law.

More recently, constitutional theorists have explored this problem from the perspective of legitimacy. In other words, when the Court does act to overturn provisions of positive law, how (if at all) can the action be considered legitimate? Upon what principle do such decisions rest? In his study of the jurisprudence of Justice William Brennan, Frank Michelman finds a tension in Justice Brennan's thought between a commitment to democracy and a commitment to individual rights. When determining whether to uphold a particular provision of law, Michelman suggests, Brennan and other justices must resort to a "law of lawmaking," or "constitutionalism," which Michelman defines as "a supervening law that stands beyond the reach of the politics it is meant to contain" (1998, 400). When judicial review leads the Court to overturn an act of Congress or the executive, it is the "law of lawmaking" that serves as a standard to guide judicial decision making and to evaluate the Court's decisional record in retrospect. Michelman perceives the following dilemma. A purely procedural jurisprudential standard would require a democratic determination at every decision-making level: in both the enactment of laws themselves and the interpretation of those laws in the context of disputes over their meaning. A procedure-independent jurisprudential standard, on the other hand (constitutionalism, or a "law of lawmaking"), would allow for determination of constitutional meaning, but might also shortchange the ideal of self-government in the sense that justices "undertake moral readings of constitutional texts in order to resolve for the country basic and contested issues of political morality" rather than allowing resolution of those issues through popular self-government alone (415).

If one starts from the assumption that legal rules must be democratically agreed-upon and enacted, then the ability of an independent institution like the Supreme Court to rule upon their validity via judicial review appears suspect in terms of democratic theory. But if rules are permitted that are not democratically agreed-upon and enacted, then the question of their legitimacy arises. According to Michelman, Justice Brennan confronted the rights and democracy tension during his time on the Supreme Court, and although the country was "gloriously well-served by Brennan's career," the conception of democracy evident in his work did not succeed in resolving the tension (1998, 399). Brennan saw the Court "as invested with authority and responsibility to interpret for the country a procedure-independent standard of rightness, justice, and democracy for its political regime" (426). Procedure-independent standards of interpretation might come from legal tradition, institutional practices that have crystallized over time, or some other source, but in any case, this understanding of what the Court does, in Michelman's view, cannot be considered the equivalent of self-government (426). When the Court acts on behalf of the minority view, as it did in vindicating habeas corpus for post–September 11 detainees, the need remains to explain how and why such decisions are legitimate.

In "Constitutional Democracy: A Paradoxical Union of Contradictory Terms?" (2001), Habermas addresses the same problem. He rearticulates the rights and democracy tension as the tension between private and public autonomy. Self-government reflects public autonomy: the freedom to participate in a lawmaking enterprise that produces the laws to which one is subject. Human rights, by contrast, implicate private autonomy: the recognition of a private space where individuals are free from government violence, control, or interference. The apparent "paradox" indicated in the article's title consists in the limits imposed on popular sovereignty (or public autonomy) by guarantees of individual rights (private autonomy). Habermas wants to point out that, in fact, the relationship between public and private autonomy is not paradoxical, but rather complementary. Legitimization becomes possible through two aspects of the lawmaking process: (1) "public and private autonomy require each other" (767), and (2) the generation of legal norms unfolds in historical time.

The complementary relationship between public and private autonomy is evident when one views the process of self-government as proceeding in two stages. First, participants bind themselves to law as the medium by which political association will be determined (Habermas 2001, 776). At this initial stage, they also understand that certain rights (e.g., equal treatment, freedom of action) are necessary before they can act in concert to carry out self-government. This first stage is somewhat abstract, but it must take place before actual lawmaking. As Habermas says, "Only when the private autonomy of individuals is secure are citizens in a position to make correct use of their political autonomy" (780). In the second stage, the concrete content of laws emerges as citizens respond to their environment and the needs and problems it generates, guided by their commitment to the binding force of law as articulated in the first stage.

This insight about the mutually enabling conditions of public and private autonomy is stated a bit differently by Benhabib (1989, 152) in her explanation of what she calls (crediting Habermas) "discursive legitimacy." Legitimacy entails justification in the sense that participants in lawmaking exchange reasons for their views and seek to persuade each other to accept these views as valid. The giving of reasons envisioned in discursive legitimacy forecloses certain views that could never be sustained (e.g., views opposed to egalitarianism). An anti-egalitarian, or antirights, position cannot be sustained, because the would-be bearers of rights would not assent to laws that treat them as inferior. Thus, the only way to instantiate laws that reject egalitarianism would be to exclude from the deliberative process those people who would be on the

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"losing end" of such laws. This exclusion, of course, would violate the procedural requirement of full participation. Thus, Benhabib's reading of discursive legitimacy sheds additional light on how the idea of individual rights is bound up with popular sovereignty.[1]

With regard to the second aspect of legitimization in a constitutional democracy—that is, the historical dimension—Habermas points out that legal norms are subject to contestation and correction over time. They are not fixed once and for all by the act of founding or constituting the political community, but are, rather, open to pragmatic reexamination over time. At certain key moments in constitutional history, such as the New Deal period, one sees that

> groups hitherto discriminated against gain their own voice and ... hitherto underprivileged classes are put into a position to take their fate into their own hands. Once the interpretive battles have subsided, all parties recognize that the reforms are achievements, although they were at first sharply contested. (Habermas 2001, 774)

The recent interpretive work by the Supreme Court with regard to detainees' rights stands as another example of "reforms [that] are achievements, although they were at first sharply contested." Following the four Court decisions cited here, the Bush administration left office, and, immediately upon taking office, the new administration issued several executive orders reversing course on detention of terror suspects and interrogation practices.[2] In rendering its detainee decisions, the Court relied to a significant extent on its independent reviewing capacity, and the newly-elected chief executive sided with the Court, not with the preceding administration. This policy change evidences what Habermas refers to as the ongoing development of legal norms over time.

Habeas corpus is a right contained in the U.S. Constitution, but the *Boumediene* case interpreted its significance more broadly. It is also a principle of liberty that comes to us from its historical English origins in the Magna Carta. The Court could have interpreted the MCA as a suspension of the writ and thereby avoided conflict with the political branches. Article I allows for suspension, and such an interpretation would have preserved the majority preference expressed in the legislation. In choosing the opposite course—invalidating an act of Congress and reinstating individual rights that had been denied by the legislative majority—the Court used a procedure-independent standard of judgment. Its decision rested not on deference to the will of Congress, but rather on a reading of Anglo-American legal history that gave decisive weight to the importance of individual liberty. Habeas corpus was central to the story the Court told about the centuries-old struggle for individual rights against the executive branch. "Brennan and democracy—how to have both?" Michelman asks (1998, 399). "Brennan" here, of course, signifies not only the late justice himself, but also the notion of a substantive constitutional vision employed in the service of justice. The detainee cases, *Boumediene* in particular, provide a salutary example of a decision produced by such a view. The recent theorizations about the tensions between democracy and constitutionalism that I have reconstructed here make claims of legitimacy for the pro-detainees' rights decisions more persuasive. ■

NOTES

1. I take this to be a point about the relationship between full participation (democratic norm) and egalitarianism (rights norm).
2. Executive Order 13491, 74 F.R. 4893 (January 27, 2009); Executive Order 13492, 74 F.R. 4897 (January 27, 2009).

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