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Faulty History at the D.C. Circuit

Guest Blogger

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The District of Columbia Circuit's 2-1 decision in *Boumediene v. Bush* directing dismissal of Guantanamo Bay detainee habeas corpus petitions turned partly on a historical assessment of the scope and meaning of the Great Writ. The judges all agreed that section 7 of the Military Commissions Act of 2006 ("MCA") eliminated habeas jurisdiction over petitions filed by or on behalf of aliens detained at Guantanamo. Writing for the court, Judge A. Raymond Randolph found that the MCA did not violate the Constitution's Suspension Clause because, he concluded, the writ of habeas corpus was not available to non-citizens detained outside the sovereign territory in 1789. Dissenting Judge Judith Rogers disagreed, finding that the writ would have been available in a territory like Guantanamo at the time of the nation's founding. The MCA was void, she concluded, because Congress had eliminated habeas jurisdiction without suspending the writ or providing an adequate and effective substitute.

What role history will play at the Supreme Court remains uncertain. But it is useful to identify some shortcomings in the court's analysis and in the inferences drawn from the historical record.

To begin with, the D.C. Circuit treated as an open question whether the writ would historically have extended to a territory like Guantanamo, where the United States exercises complete and exclusive jurisdiction and control, but not sovereignty. That question, however, was already answered by *Rasul v. Bush* (542 U.S. 466 (2004)). There, the Supreme Court concluded that the "[a]pplication of the habeas statute to persons detained at the [Guantanamo naval] base is consistent with the historical reach of the writ of habeas corpus." Importantly, in *Rasul* the Court rejected the government's argument that the writ's reach at common law turned on territorial sovereignty rather than on "the practical question" of the crown's control over the particular territory. The Court relied, for example, on *King v. Cowle* (97 Eng. Rep. 587 (K.B. 1759)), where Lord Mansfield explained that the writ would run to territories "under the subjection of the Crown."

The D.C. Circuit also misconstrued the historical record. Contrary to the court's conclusion, and as noted by the dissent, the common law writ was available in territory where the Crown exercised *de facto* but not *de jure*

sovereignty. In India, English courts issued writs of habeas corpus to non-citizens unlawfully detained by crown officials. Moreover, in India Britain intentionally delayed the assertion of formal sovereignty over crown-controlled territories for decades after judges had begun issuing writs of habeas corpus on behalf of prisoners there to curb arbitrary exercises of power. (Disclosure: I represented a group of historians as amici curiae who argued these issues to the court). What this history shows is that there were no legal black-holes at common law, not that sovereignty was the touchstone, let alone the sine qua non, of habeas jurisdiction.

In fact, in no case before 1789 was the common law writ of habeas corpus held not to extend to territory under the crown's exclusive control and jurisdiction. To the contrary, courts historically resolved any questions about the writ's territorial reach in favor of its availability. The default rule in favor of habeas jurisdiction should apply with even greater force where the executive deliberately seeks to create a prison in a territory under its complete and permanent control to circumvent judicial review, as it has done at Guantanamo.

Judge Randolph also ignored the distinction between statutory and common law habeas. Judge Randolph pointed to Habeas Corpus Act of 1679, reasoning that the act's time-limits for producing a prisoner showed that the writ would not run outside the sovereign territory of the crown. But this statute applied only to criminal cases and did not affect the common law writ which remained available in cases of executive and other non-criminal detention, including detention by the military. No territorial limits were placed on the common law writ's reach, and it was this writ, not the 1679 act, that traveled to America and was operating in all thirteen colonies that rebelled in 1776. (Judge Randolph's statement that there is no common law jurisdiction misses the point; as the Supreme Court explained in *INS v. St. Cyr* (533 U.S. 289 (2001)), the Suspension Clause guarantees statutory habeas jurisdiction at least in all cases where the writ would have been available at common law). In addition, it is ironic indeed to claim that the 1679 act - whose procedural reforms prompted William Blackstone to extol the statute as a "bulwark of individual liberty" - sanctions the creation of lawless enclaves in the twenty-first century. Merely because it might have been impractical to impose the 1679 act's time-limits on habeas petitions filed by or on behalf of individuals held overseas four centuries ago does not support limiting constitutional habeas jurisdiction today to territory where the United States exercises sovereignty.

The court also mistakenly suggested that the Suspension Clause protects only the writ as it existed in 1789. As Judge Rogers notes, the court ignored the Supreme Court's repeated statements that the Suspension Clause, at a minimum, protects the writ as it existed in 1789. (Marty Lederman also makes this point in his account of the decision). Judge Randolph thus neglected to consider whether the writ should extend to Guantanamo even if it would not have extended to such a territory in 1789. Assuming there were no common

law case directly on point, the availability of habeas at Guantanamo is central to the writ's core purpose as a safeguard of individual liberty. Legal challenges to executive detention at Guantanamo thus fall squarely within the heartland of habeas protected by the Suspension Clause, direct analogies from history aside.

Because the court found that the detainees had no constitutional right to habeas, it did not consider whether review by the D.C. Circuit of Combatant Status Review Tribunal ("CSRT") decisions under the Detainee Treatment Act of 2005 could provide the adequate and effective substitute that the Suspension Clause requires. Judge Rogers, however, found this review scheme inadequate and ineffective, even though she rejected the claim that the detainees have rights under the Due Process Clause of the Fifth Amendment, as the district court had held in *In re Guantanamo Detainee Cases* (355 F. Supp. 2d 443 (D.D.C. 2005)). Judge Rogers thus recognized that Guantanamo detainees possess a core right against executive detention inherent in the common law writ of habeas corpus distinct from rights they may assert under the Fifth Amendment (rights the Supreme Court seemingly acknowledged in footnote 15 of *Rasul*). Judge Rogers concluded that the DTA's narrow review of the flawed CSRT process, which lacks any meaningful factual inquiry, cannot provide adequate and effective substitute for common law habeas, a process codified in the habeas statute, 28 U.S.C. 2241 et seq. Indeed, Justice O'Connor described a similar habeas process, distinct from the Due Process Clause, in *Hamdi v. Rumsfeld* (542 U.S. 507 (2004)), as did Judge Michael Mukasey in *Padilla ex rel. Newman v. Bush* (233 F. Supp. 2d 564 (S.D.N.Y. 2002)). In short, at common law, prisoners routinely obtained a meaningful judicial inquiry into the factual as well as legal basis for their detention – precisely what the combined effect of DTA review of CSRT decisions precludes.

Ultimately, the most compelling historical argument against the MCA is that the concept of a law-free zone at Guantanamo contradicts the writ's essence as a check against unlawful executive detention. The notion that the President can maintain Guantanamo as a prison beyond the law based on the legal fine print of sovereignty is antithetical to the basic principles habeas corpus and the Suspension Clause embody. It does not take a historian to recognize this much.