FOCUS
THE PAST, PRESENT, AND FUTURE OF RULE OF LAW

MAGNA CARTA AND THE AMERICAN POLITICAL IMAGINATION: TWO INSTANCES OF HABEAS CORPUS VINDICATED

H. Robert Baker*

Abstract Magna Carta has long been understood as a source of inspiration for the U.S. Constitution, and especially its enshrinement of the writ of habeas corpus — the right of any prisoner to test his or her detention according to the law. In the “Suspension Clause” of the U.S. Constitution (Article I, Section 8), Congress is granted permission to suspend habeas corpus only “when in cases of Rebellion or Invasion the public Safety may require it.” This article surveys two failed attempts by the U.S. government to suspend the writ of habeas corpus. The first (which was actually the very first such attempt) was in 1807 and followed revelations of the so-called Burr Conspiracy. The second (incidentally the most recent in American history) occurred during the War on Terror and culminated with the Supreme Court’s decision of Boumediene vs Bush in 2008. A close examination of these two historical episodes reveals just how different were the constitutional processes of the early republic and contemporary times. Additionally, comparing the uses of Magna Carta during the two episodes demonstrates marked changes in American political culture. Historical consciousness, vital to early Americans’ understanding of their political system, has shifted to an elite level. Likewise, the protection of fundamental liberties has migrated from the popular branch of government (Congress) to the elite one (the Supreme Court). This article considers the implication of this shift in both constitutional processes and historical consciousness.

Keywords Constitutional Law, legal history, habeas corpus, suspension clause, Magna Carta

INTRODUCTION .................................................................................................................... 216

I. THE CONGRESSIONAL BILL TO SUSPEND HABEAS CORPUS IN 1808 .................. 218

A. The Conspiracy of Aaron Burr ................................................................. 218

* H. Robert Baker, Ph.D in History from University of California, Los Angeles; Associate Professor, at Department of History, College of Arts & Sciences, Georgia State University, Atlanta, US. Contact: robertbaker@gsu.edu

The author wishes to thank JIANG Dong of Renmin Law School for his intellectual guidance and Ryan Max Rowberry and David Sehat for commenting on drafts of this article.
INTRODUCTION

Magna Carta has always had a special place in the American political imagination. It has been cited frequently before the Supreme Court and invoked by congressmen and presidents. Friezes that adorn public buildings, most notably on the north wall of the U.S. Supreme Court, depict the signing of Magna Carta, and it has served as inspiration for both the framers of the Constitution and the stalwarts of the Civil Rights Movement. Americans respect and revere Magna Carta largely because America’s political tradition celebrates individual liberty against state power. However frequently or loudly Americans proclaim their tradition of liberty, America’s history is replete with episodes of liberty denied. The episodes are numerous, and most often conducted under color of law: the spread of slavery following the adoption of the U.S. Constitution; the dispossession and ethnic cleansing of Native Americans in the nineteenth century; the exclusion of Chinese immigrants during the late nineteenth century; the internment of Japanese-Americans during World War II; the list could go on. But the existence of a complicated past, one in which a tradition of liberty coexists with instances of oppression, should not be taken simply as evidence of rank hypocrisy or moral bankruptcy. It is, rather, an invitation to treat the subject maturely. A proper understanding of America’s commitment to individual liberty must begin with the sober examination of those moments when politicians attempted to use the levers of power to restrict freedom.

Of all the symbols of Anglo-American liberty, one of the most ancient, revered, and even most mythical, was the writ of habeas corpus. By the time of the drafting and ratification of the U.S. Constitution in 1787–1788, the writ was well known as a judicial bulwark against executive tyranny. The judge issuing the writ could require that any prisoner be brought before his court to test whether his detention was according to proper legal process. Although not specifically mentioned in Magna Carta, the “Great Writ,” as it is called, traces a lineage nearly that old.¹ Many of the Founding generation would conflate the writ’s command with the promise issued in Magna Carta’s famous promise

from the king that “no free man shall be taken, imprisoned, disseised, outlawed, or in any way destroyed, nor shall We proceed against or prosecute him, except by the lawful judgment of his peers and by the Law of the Land.” Habeas corpus was of especial importance to the Framers, and the writ is protected in the Suspension Clause of the U.S. Constitution, which provides that Congress will not suspend the writ of habeas corpus “unless when in cases of Rebellion or Invasion the public Safety may require it.”

This article looks at two episodes in American political history where political actors attempted to suspend the writ of habeas corpus. The first was in 1807 in the wake of the Burr Conspiracy. A bill calling for the temporary (three month) suspension of habeas corpus was passed by the Senate and sent to the House for consideration, which declined to pass it. The second episode began in 2006 with the passage of the Military Commissions Act. This statute suspended habeas corpus specifically for prisoners at Guantanamo Bay awaiting determination of their status as enemy combatants. Although the bill (originally a proposal of the Bush Administration) was passed by both houses of Congress, it was later struck down by the U.S. Supreme Court in Boumediene vs Bush (2008). These are not the only instances in American history of attempted suspension of habeas corpus. Arguably the most famous instance of suspension came with President Abraham Lincoln during the Civil War (1861–1865), and it is specifically neglected here. There are ample reasons for avoiding this famous case and selecting these two other instances. First, they were both failures. In both cases, attempts to invoke security concerns in order to curtail political liberty were turned back by constitutional processes. During the Civil War of 1861 to 1865, constitutional processes were operating in the midst of extreme internal crisis, making comparison of the events more difficult, especially if we wish to consider them as constitutional moments during a period of ordinary politics. Second, the distance between these two events makes them attractive. Because they are separated by 200 years of constitutional development, they serve as clear markers of historical change in the American constitutional system. Comparison of the two may not lead to definitive explanations of why historical change has occurred, but they do cast into sharp relief the changes in constitutional structure in which conflicts are mediated. They also allow us to contrast the political culture of America’s first generation with its most recent.

In both episodes, we find Magna Carta playing an important role both as legal source and as rhetorical ornament. But a close examination of references to Magna Carta yields important differences in both constitutional structure and political culture from 1807 to 2008. In the early nineteenth century, Magna Carta was a document cited widely in the

---

2 This would be Chapter 39 in the 1225 reissue of Magna Carta. Text is from A. E. Dick Howard, *Magna Carta: Text and Commentary*, (reissue) University of Virginia Press (Charlottesville and London), (1988).

press and in both houses of Congress. Whether discussing lawmaking in the popular branch of government or debating public issues in newspapers, Magna Carta was a common reference point in the historical imagination. The same cannot be said of the U.S. Supreme Court, which did not cite Magna Carta in the first two decades of its history. During the debate about the suspension of habeas corpus in 1807, we see a robust debate in the House of Representatives about the nature of the Great Writ and the implications of suspension in which Magna Carta was invoked frequently. During the congressional debate over the Military Commissions Act of 2006, Magna Carta made only a scant appearance. It did, however, play a much larger role when the issue of suspension came before the U.S. Supreme Court in 2008. As we celebrate the 800th anniversary of Magna Carta, it is worth contemplating what this change signals for individual liberty — one of Magna Carta’s most enduring yet embattled legacies.

I. THE CONGRESSIONAL BILL TO SUSPEND HABEAS CORPUS IN 1808

There can be little doubt that Magna Carta was widely read and understood in the eighteenth century Anglo-American world. Its luster owed much to the seventeenth-century English political struggle between the Stuart monarchs and parliament. Parliamentarians who resisted royal authority cited the Great Charter as evidence that the king had always been beneath the law in England. In the eighteenth century, Sir William Blackstone forever immortalized the “famous magna carta” as England’s first statute in his *Commentaries on the Laws of England*. Citations to Magna Carta are an embarrassment of riches in the period. It served as inspiration for rebelling colonists. It was first in the mind of Granville Sharp, progenitor of the trans-Atlantic antislavery movement, who began with Magna Carta in his monumental effort to prove that slavery did not exist at common law. The principles of Magna Carta can be found directly in the Constitution, most notably in the Supremacy Clause and more indirectly in the guarantees for due process and trial by jury.

A. The Conspiracy of Aaron Burr

The first real test of habeas corpus in the U.S. came in the wake of the Burr Conspiracy, uncovered in 1806. Aaron Burr, a New York politician of relentless energy

---


7 U.S. Constitution, Article VI; Amendments V, VI, VII. See generally A. E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America*, University Press of Virginia (Charlottesville), (1968).
and ambition, had very near risen to the heights of national fame with the overwhelming victory of Thomas Jefferson’s Democratic-Republicans in the Election of 1800. He and Jefferson garnered the same number of electoral votes for President in 1800, although people largely understood the electors’ and their constituents’ desire had been to elevate Jefferson to the presidency. But Burr refused to step aside, and he inaugurated a political crisis that was resolved only at the eleventh hour by the Electoral College. Burr’s ambition finished him. Having lost all influence with President Jefferson, Burr returned to New York to run for governor in 1804. A spat with former Treasury Secretary Alexander Hamilton led to a duel, and Burr killed Hamilton. Facing a murder charge in New Jersey (where the duel had taken place), Burr traveled to the American West to make his fortune. Although historians still cannot say with any precision what were his plans, it likely involved raising an army to make war on Spain. More ominously, his schemes contemplated the creation of a new republic west of American territory that could, eventually, claim the loyalty of Americans who were emigrating past the Appalachian Mountains into the Ohio and Mississippi river valleys. Burr’s enemies would claim that he intended an actual western rebellion in territories belonging to the U.S.8

Regardless of whether Burr actually intended to subvert the U.S. government, the threat was very real. The Louisiana Purchase of 1803 had opened up the trans-Mississippi frontier to American settlement, but this did not insure continental mastery. America was most vulnerable on precisely the frontier that Burr picked.9 The diffusion of power in its federalist system and the general weakness of the national government made the U.S. prone to intrigue, and the danger increased the further from the capitol one traveled. Burr’s plot may have failed, in fact may never have been a treasonous plot at all, but it nonetheless frightened members of the national government. The Jefferson administration proceeded against him with the full might of American law.

B. The Secret Senate Bill to Suspend Habeas Corpus

Whatever plans Burr did have were scuttled by U.S. officers very quickly. Even though the conspirators appeared to have been all rounded up by the close of 1806, the U.S. Senate passed a bill on January 23, 1807 suspending the writ of habeas corpus for three months.10 Senate deliberations in those days were privileged, so we know very little about them. John Quincy Adams, the future president and in 1807 a senator, was appointed a member of the committee to draft the bill. He recorded in his diary that the committee floundered. “We examined some English books for precedents,” he explained,

---


“but could not find any.” After a short bill was drawn up, Adams himself wrote a confidential missive to the House of Representatives.”

The bill and Adams’s letter was delivered to the House of Representatives with the request that they be received in secret and passed as an emergency measure. But upon receiving word that the secret bill involved the suspension of habeas corpus, the House immediately passed a motion “that the message and bill received from the Senate ought not to be kept secret, and that the doors be now opened.” The motion passed with only three dissenting votes. It was an act pregnant with symbolism, and an implicit rebuke to the Senate for its lack of transparency. This was not lost on John Quincy Adams, who was stung sharply enough to mention it in his diary.

C. The Constitutional Debate in the House of Representatives

No one disputed the power of Congress to pass such a bill — the power to suspend habeas corpus was firmly embedded in Article I, Section 9. But the clause was also intended to act as a restraint on congressional power, mandating that Congress not suspend the writ unless “when in cases of Rebellion or Invasion the public Safety may require it.” What was remarkable was that the bill was not even taken through the customary first and second readings before deliberation, which was customary. Deliberation most often did not occur until the third reading, after which the House would vote on passage. But the House considered a motion to dismiss the bill after its first reading. To reject the bill on its first reading, “without passing through the ordinary forms of proceeding,” as Samuel Whittlesey Dana, Federalist representative from Connecticut, put it, signaled that the House believed the bill had grave constitutional problems. This was something more than concern over a bill’s political merits, which would have been expressed after the second reading and before a final vote on the bill’s passage. It was also something more than technical. As Dana reminded everyone, if representatives believed that the bill could be modified, “it ought to go to a Committee of the Whole” for revision. To fail to do this was sending a clear signal that the bill itself had fatal constitutional defects.

A constitutional debate followed. Congressmen posed the question of whether the Suspension Clause’s terms had been met. A string of congressmen raised the same point...

---


13 See Adams, fn. 11 at 446.

14 See fn. 12 at 424.

15 Id. Dana’s argument about the improper nature of the bill actually turned on his reading of the ex post facto clause of Article I, Section 9, Clause 3. Dana read the bill to be operating on people who had already been arrested, and in that sense he felt it improper.
over and over again: The public was quite safe. The conspiracy had been unraveled, the conspirators were in jail awaiting trial, and all plans had been scuttled. In close succession, William Armisted Burwell, James Elliot, and John Wayles Eppes all condemned the bill for the same constitutional reason — that there was no evidence that the public safety required the suspension of habeas corpus. 16 Only Speaker Joseph Bradley Varnum spoke in favor of the bill, arguing that the conspiracy was real and that public safety concerns did indeed warrant suspension.17 The first focus of the debate was an examination of factual circumstances and whether they met the constitutional standard of “when the public safety requires it.” In this sense, the episode was quite typical for constitutional debate in the early republic. The question of the extent of congressional power was one for deliberation in both houses of Congress, and subject to the strong presidential check of the veto and the weaker check of judicial review. In the early nineteenth century, this was a debate that took place most often in the halls of Congress itself.18

But the standard for suspension was not just checking an isolated fact pattern against the constitutional rule. Congressmen may have begun their arguments with reference to the text of the Constitution, but text alone could not explain the character of habeas corpus or the substance of the suspension clause. Only history could supply this meaning. “Let us pay a little attention to the nature and character of the writ of habeas corpus,” said James Elliot, Federalist from Vermont. “It has its origin in Great Britain…As it respects the subject, it is a writ of right, and is emphatically called, by English writers, a writ of liberty. By the provisions of the famous statute of Charles II, which has ever been called a second magna charta, its privileges are guarantied to all British subjects at all times.”19 Elliot’s story was repeated by several congressmen, and reprinted widely in the American press.20 It was not difficult to find the genesis of the story — Elliot had taken it directly from Sir William Blackstone’s Commentaries, or perhaps from St. George Tucker’s American edition of Blackstone.21 The narrative positioning of Magna Carta as source here was quite clear — Blackstone and others derived rule of law and individual liberty in Magna Carta, and then clearly plotted further advances, such as the Habeas Corpus Act of 1679, as refinements of the principle. This was certainly not deep plotting, nor even in-depth source work. In fact, its rhetorical invocation depended upon precisely the

16 Id. at 404–411.
17 Id. at 411–413.
opposite. By referencing the minimal plot lines, congressmen were referencing a shared history, one that would resonate with their audience both inside and outside the congressional chamber.

A shared past is only one element of historical thinking. So too is the understanding of how laws gained substance and were transmitted from age to age. The “fundamental rights of Englishmen,” said James Madison Broom of Delaware, “have existed from their earliest ages; they were collected in a body by Edgar the Saxon; they were revised by Edward the Confessor, and were ratified by William the Conqueror; they were recognized by Magna Charta, and after the wars between Henry III, and his subjects, were confirmed by the statute of Marlborough, and never afterwards questioned.” These were not rights “merely secured by parchment,” but rather “incorporated with the habits, manners, and customs of the people,” and “guarded as a precious inheritance...The people were early taught to know them, and to consider it a sacred duty to draw their swords in defence of them.” These rights were not “merely secured by parchment,” but rather “incorporated with the habits, manners, and customs of the people,” and “guarded as a precious inheritance...The people were early taught to know them, and to consider it a sacred duty to draw their swords in defence of them.”

Magna Carta was not, in this formulation, parchment to be scoured for source of rights. It was instead evidence of the people enforcing their rights against arbitrary power and a moral example to contemporaries.

While we should not be so vulgar as to think that an intellectual culture that privileged historical thinking produced uniform thought, we should be mindful of how it shaped people’s expectation of political outcomes. If the past was the living record of executive abuse of power turned back only by eternal vigilance, then the present should be interpreted in those terms. At risk was something more than the immediate threat of Aaron Burr and his conspirators. Roger Nelson, Democratic-Republican from Maryland, warned his fellow congressmen that the temporary suspension of habeas corpus could become “a most damnable precedent.” Imagine, Nelson asked, a wicked future president “who wishes to oppress or wreak his vengeance on those who are opposed to him.” Such a man, said Nelson, “will fly to this as a precedent.” Behind such thinking was a historical vision of rights perpetually threatened by personal ambition. Nothing short of eternal vigilance would maintain safeguards for liberty.

John Randolph of Virginia acidly commented that he would “consider this bill, if it passes, as establishing a new era in the Government.” If rights were understood as mutable and surrendered at the first instance, then the path would irrevocably lead to tyranny. “When I was a boy,” said Randolph, “I recollect to have consulted such chronological tables as I could get access to. I recollect to have read, that at a certain time,
monarchy was abolished in Rome; a little while after, the first Dictator was named; then the second Dictator — and I believe, as in a case of apoplexy, she scarcely got over the third fit. I believe a suspension of the writ of habeas corpus might have, here, the same effect as the establishment of the first Dictatorship at Rome.”25 This was analogical reasoning to be sure, but was no less a narrative about English and American rights for being so.

Representatives did not need to sack Roman history for such precedents, however. John Smilie of Pennsylvania spoke plainly about the import of this vote to “repeal an important part of the Constitution.” He recounted its familiar history as the palladium of liberties in England, and noted that it was suspended in England in 1715 when the son of James II invaded the realm, and again during the Jacobite rebellion of 1745. However legitimate the first suspension, opined Smilie, “in latter times, when the Government had grown more corrupt, we have seen it suspended for an infinitely less cause.”26 In the historical imagination, political degeneration into tyranny was ever around the corner, and often to be found in the smallest details. Proponents of the bill noted that it was a short-term expedient with a three-month expiration date, an argument that John Randolph treated with contempt: “As to its three months’ continuance, I consider that as one of the most objectionable features of the bill — as a bait to the trap; as the entering wedge.”27

In the end, the 1807 bill to suspend habeas corpus for three months did not survive in Congress. The Senate may have passed it in secret, but the House rejected it after the first reading by the overwhelming margin of 113–19.28

II. VARIETIES OF USES OF MAGNA CARTA IN EARLY AMERICAN POLITICAL DISCOURSE

The presence of Magna Carta in the first national debate over the suspension of habeas corpus shows us the deeply historical nature of American thinking in the early republic. Rights were understood within the historical context of struggle, and of the necessity of balancing principles and thinking in terms of consequences. No one should doubt the widespread audience for these debates — the speeches of representatives were watched from packed galleys, and reprinted in newspapers in virtually every state.29 This was as much a popular political language as it was an elite one, and probably even more so. And it is here where the ubiquity of Magna Carta as metaphor, artifact, and source is

25 Id. at 420.
26 Id. at 422.
27 Id. at 421.
28 Id. at 424.
29 And this during a time when there were 10 newspapers for every man, woman, and child in the US. See Joyce Oldham Appleby, Inheriting the Revolution: The First Generation of Americans, Belknap Press of Harvard University Press (Cambridge), (2000).
breathtaking. A quick survey of American newspapers in the nineteenth century will turn up over 2,000 references.30

Not all these references were in the name of human freedom. In fact, Magna Carta was invoked to defend a variety of liberal and illiberal positions. A prominent example is during the furor touched off by Missouri’s application for statehood as a slave state in 1819. Missouri’s close proximity to the free northwest raised fears that slavery would come to dominate the remaining territory from the Louisiana Purchase. James Tallmadge, representative from New York, introduced an amendment to the bill authorizing Missouri’s admission that would both prohibit slavery in the remaining territory and force Missouri to adopt a gradual emancipation statute. Here was a bold move in favor of human freedom, and it predictably provoked the fear and loathing of slave state congressmen. “What seeds of discourse will you sow,” asked John Scott, delegate of Missouri, “when [Missourians] read this suspicious, shameful, unconstitutional inhibition in their charter? Will they not compare it with the terms of the treaty of cession, that bill of their rights, emphatically their magna charta? And will not the result of that comparison be a stigma on the faith of this government?”31 In a later session, James Pindall of Virginia opined that the slaveholding framers of the Missouri constitution had imitated “the declarations of magna charta.”32

If Magna Carta could be invoked to defend slaveholding constitutions and to discredit attempts at abolition, can it still be considered as a symbol of liberty for nineteenth-century Americans? Yes, with qualifications. Certainly during the first debate about the suspension of habeas corpus, congressmen deployed Magna Carta as both source and metaphor to defend individual liberty against governmental power. But Magna Carta was larger than that. Magna Carta was a symbol of liberty, of government’s accountability to the people, and also of popular sovereignty. This was why Americans often spoke of the Declaration of Independence, rather than the Constitution or the Bill of Rights, as “our Magna Carta.” One poet viscerally inscribed this principle in his commemoration of Bunker Hill,

> When our sires, our gallant sires, their dearest birthright shielded,  
> And wrote our Magna Charta in the sacred blood they yielded.33

---

The sacrifice of patriots gifted the “magna carta” of self-governance to future generations of Americans. They gifted them liberty, too, and along with it slavery. Such contradictions existed, and existed even in Magna Carta. The breadth with which the charter could be invoked was indicative of its great popular reach, and also symbolically of the problems it left unresolved.

III. MAGNA CARTA IN TWENTY-FIRST CENTURY AMERICAN POLITICAL CULTURE

200 years later, Magna Carta’s presence in American political culture seems prominent by some measures and absent by others. Appellate courts cite it more frequently now, and the U.S. Supreme Court has made more use of it in modern times than it ever did before. Images of Magna Carta were inscribed in the public works projects of the 1920s and 1930s, intensifying its presence in everyday life. But popular references in newspapers, and in the congressional record, have declined, and are even absent in the last decades of the twentieth century.34 This decline is symptomatic of a U.S. public that increasingly sees itself as locked in an interminable present, against which the past has become largely irrelevant.35

A. Habeas Corpus Review of Indefinite Suspension at Guantanamo Bay

Nowhere has the absence of historical thinking been more on display than during the national debate over the extent of power the U.S. government should wield in its “War on Terror.” The attack on the twin towers in New York City on September 11, 2001 set in motion a rapid succession of events, the extent of which is still unknown. It will be up to future generations of historians to uncover the stories of all those affected by government policies of indefinite detention, extraordinary rendition, and “enhanced interrogation.” From roughly 2001 through 2008, controversy simmered as President George W. Bush’s administration took increasingly expansive views of executive power to prosecute the war. One of those was to open a prison in Guantanamo Bay, Cuba for the holding of “enemy combatants,” a nether-status given to detainees who were neither prisoners of war nor domestic criminals.36

35 This has been pointed out by numerous intellectual historians, but see generally Daniel T. Rodgers, Age of Fracture, Belknap Press of Harvard University Press (Cambridge), (2012).
Advocates for the detainees of Guantanamo Bay challenged the Bush administration by seeking habeas corpus review in federal courts, forcing the administration to argue that the detainees could not invoke the privilege of the writ of habeas corpus. This amounted to an executive suspension of the writ, if only in a limited manner. The Supreme Court encountered this question in Rasul vs Bush (2004), a case involving foreign nationals who challenged their detention at Guantanamo Bay. In a 6–3 decision, the Supreme Court held that habeas corpus jurisdiction extended to Cuba and that foreign nationals were entitled to relief under its provisions. In Hamdan vs Rumsfeld (2006), the Supreme Court further stated that military commissions established by the president lacked the proper authority to try terrorists.

B. The Congressional Debate over the Military Commissions Act of 2006

The Bush administration sought congressional help and proposed a bill in the summer of 2006. This bill was never introduced into Congress, primarily because of concerted opposition by three Republican senators, all of whom had service records and all of whom were concerned that the proposed bill attempted to do away with common Article 3 of the Geneva Conventions of 1949. The Bush administration offered a redraft, which was introduced to the House and Senate in September. While the Bush administration’s new draft answered the concerns of Republican senators regarding the Geneva Conventions, the proposal explicitly stripped federal courts of habeas jurisdiction over aliens awaiting status determination. This amounted to a practical suspension of habeas corpus, albeit in a limited nature. Nonetheless, the bill drew enough heat that a debate over the Suspension Clause followed in both Congress and the public press.

The political context of the Military Commissions Act was important. The bill was introduced about two months before the 2006 midterm elections. While the timing was dictated in part by the Supreme Court’s Hamdan decision, there was also clearly a rush to

38 At the time, only two U.S. citizens were detained as enemy combatants. Their cases also reached the Supreme Court under Rumsfeld vs Padilla, 542 U.S. 426 (2004) and Hamdi vs Rumsfeld, 542 U.S. 507 (2004).

The bill was introduced into the Senate by Sen. Mitch McConnell on Sep. 22. It passed the Senate on Sep. 28, the House on Sep. 29, and was signed into law on Oct. 17. This would become the Military Commissions Act of 2006, 120 Stat. 2600 (2006) Public Law 109–366, 109 Congress Session 2.
put the bill to a vote before the November election in order to secure its passage. This necessarily limited debate on the bill. It also stymied compromise with Democrats who were concerned about habeas corpus suspension, as well as other issues. Combined with this was increasing public dissatisfaction with the war in Iraq and a Congress bitterly divided along party lines. For these reasons, the floor debates in both the Senate and the House of Representatives had virtually nothing to do with determining the substance of the Military Commissions Act. They were largely ideological statements of support or opposition to the Bush administration’s policy, and the particular role that Congress played in it. The floor debates may not help us understand the legislative process that produced the Military Commissions Act, but they do tell us quite a bit about political culture — about the expectations of both politicians and the people they serve and the language necessary to generate public consent.

The bill’s supporters invoked the present perils of the War on Terror. Senator Bill Frist, the Majority Leader of the Republican Party, described the current conflict as “unlike any we have ever before fought.” The enemy, clarified Frist, “will actually stop at nothing to bring America to its knees.” To win on the field of battle would require “quick thinking and creativity.” Because safety and security were not static but “dynamic, constantly shifting, constantly moving,” it was necessary to adopt legislation that discarded old rules and gave the military more flexibility. According to Frist, this involved fighting “an enemy who undertakes years of psychological training to consciously resist interrogation and to withhold information that could be critical to thwarting future threats, future attacks.”

However hyperbolic, such comments were representative of anti-Islamist, neoconservative ideological support for the War on Terror. It suggested that safety and security necessitated the curbing of legal protections and the dismissal of legal technicalities. This was a familiar argument, one that invoked the binary opposition of military/civilian in order to suggest that peacetime legal protections owed to citizens had no place in wartime and no applicability to aliens captured on the field of battle.

Democrats attacked the Military Commissions Act primarily on two grounds. The first was about the process that brought the bill to Congress. The Democrats had long protested that President George W. Bush’s actions in the War on Terror had far exceeded his authority as commander in chief, even under the Authorization to Use Military Force passed in the wake of the September 11, 2001 attacks. They had demanded congressional participation and oversight, but in the end it was the Supreme Court that had forced the Bush Administration to go back to Congress. This was what some had called a “democracy

---

forcing” move by the Court.42 But if this was so, then it forced very little democracy. The substance of negotiations occurred only between several Republican senators and the administration, leaving unanswered most of the Democratic concerns about the bill. Senator Carl Levin complained of this immediately, offering as a substitute for the Military Commissions Act a legislative bill that had been worked out in the Armed Services Committee.43 Levin’s substitute bill would be voted down, an indication of just how irrelevant was the actual congressional role in determining the content of its own legislation. So fatuous was this process, claimed Democrats, that one could hardly call it democratic. Senator Patrick Leahy of Vermont summed it up as “Quick, pass it; quick, do it now; quick, pass it out of here so we can rubberstamp it in a signing ceremony before anybody reads the fine print.”44

The second objection to the Military Commissions Act complained of its impact on “American values,” a charge that had been raised before, primarily in reference to the scandal involving American treatment of Iraqi prisoners in Abu Ghraib. It was here where Democrats began to tease out the substance of the values that they were defending. Several directly referenced habeas corpus as one of these values, including Jeff Bingaman, Democrat from New Mexico, who pointed out (perceptively) that “we are not just suspending the writ; this proposal is to abolish the writ.”45 Senator Levin invoked the Revolutionary War, pointing out that General Washington had ordered that British captives “be treated as human beings with the same rights of humanity for which Americans were striving,” despite evidence that the British abused American prisoners.46 Senator Leahy pointed out that gross violations of civil liberties during wartime were not new. “We have done this in the past,” he said. “We did it with the internment of Japanese Americans.”47

These snippets of historical examples — and they were snippets in the overall debate, which rarely invoked historical experience — were most often than not in service of abstract statements about the nature of rights. Leahy’s argument had drawn from several historical examples, all of which (including Japanese internment) had been in Leahy’s lifetime. Levin’s invocation of George Washington was most likely a staffer’s note, as it came complete with a bibliographic citation. The example carried authority because George Washington carries authority, but there was no substantive examination of the

44 Id. S10257.
45 Id. S10262.
47 Id. S10257.
value under consideration, its lineage, or its progress from Revolution to the modern day. This starkly contrasts with congressmen in 1807 who gleaned habeas corpus’s substance and importance from historical narrative and who believed that the act of suspending habeas corpus must be contextualized in historical time. Even those who supported habeas corpus by reference to history that stretched past their lifetimes seemed largely unaware of its import. Senator Arlen Specter, Republican from Pennsylvania, warned the Senate that the principle of Magna Carta was so “fundamental” to the Framers that it went back to “1215 against King John.”  

Without elaboration, such a sentiment was devoid of real meaning. Senator Trent Lott dismissed Specter’s concern for habeas corpus because “our forefathers were thinking about citizens, Americans. They were not conceiving of these terrorists who are killing these innocent men, women, and children. These are not citizens. These are not people in America.” Against muted cries for respecting the ancient rights of habeas corpus, Lott could effectively deploy the traditional binary of citizen/alien, and of peacetime/wartime. Neither statement was reflective of a substantive or critical historical understanding that helped clarify what rights really were.

The most meaningful reference to Magna Carta came in a two-minute speech on the floor of the House of Representatives when Congressman David Wu called it a “sad day in the history of this chamber” that such a bill was being considered. Anglo-American liberty, recounted Wu, giving habeas corpus reach from Magna Carta through the struggles with the Stuart monarchs, and then through World War II. Wu, a Chinese-American born in Taiwan, had an elite education that culminated at Yale Law School. Wu connected the English history of habeas corpus with American constitutional law and the Supreme Court decision of Korematsu, in which the U.S. Supreme Court had validated the internment of Japanese-Americans during World War II. Wu had managed to raise the very real problem of maintaining liberty in the face of power, even within a country that perpetually celebrates its love of freedom. It was a brief but compelling synthesis, and no doubt owed something to Wu’s intellectual and legal training at Yale University.

C. The Military Commissions Act and the American Press

If Magna Carta was absent in the congressional record, the same cannot be said for arguments in the public press and before the courts. Certainly in America’s newspapers, Magna Carta was cited frequently, even if only superficially. In some cases, Magna Carta references seemed like something obtained in a Google search. Reporting on Bruce Fein’s

48 See fn. 41. For the comments from Arlen Specter, see S10264.

49 Id. at S10238.

critique of the Bush administration, an Akron, Ohio newspaper helpfully explained to its readers that habeas corpus was, in fact, ancient, because “the Magna Carta of 1215 mentions the Writ” (which it does not).51 An editorial in the Sarasota Herald Tribune denounced executive and congressional attempts to suspend habeas corpus by noting that habeas corpus was “a bulwark of Western law since the signing of the Magna Carta in 1215” (which it was not).52 The bulk of that editorial was a rhetorical exercise about America’s image in the modern world, in the end comparing the Constitution to a counter-insurgency manual. Other references seemed to jumble the Great Charter’s clauses: “The English barons forced King John on June 15, 1215, to sign the famous document that declared that justice could never be denied or delayed,” began one newspaper, which then concluded “That led eventually to the U.S. constitutional provision 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.’”53 This was at least not wrong.

Not all references to Magna Carta were shrouded in ignorance. After a compelling look at the nature and importance of habeas corpus, op-ed columnist Bob Herbert added a thoughtful sentence about its historical legacy: “The authority to demand that even the highest officials in a nation — even the president, even the king back in the days of the Magna Carta — justify the detention of a human being is powerful, and essential in a free society.”54 While the author spent precious few words on Magna Carta, or indeed any history predating the ratification of the Constitution, he understood and argued how difficult was the maintenance of liberty in the face of concentrated power, and how deeply the struggle mattered. Other commentators would point out the same facts, although borrowing necessarily from different epochs in history. In a widely reprinted editorial written by Albert J. Mora, general counsel of the Navy from 2001–2006, and Thomas R. Pickering, undersecretary of state for political affairs during Clinton’s administration, the historical importance of habeas corpus was given rhetorical and substantive weight: “Habeas corpus — the Great Writ — has been the pre-eminent safeguard of individual liberty for centuries by providing meaningful judicial review of executive action and ensuring that our government has complied with the Constitution and the laws of the United States.”55

Such sentiments came with as much historical depth as a 900-word editorial might allow. In general, however, the political commentary on indefinite detention and the disappearance of habeas corpus largely turned on whether terrorism was a clear and present danger or a hazy and illusory phantasm. Legal rights were sourced to the Constitution, and sometimes outsourced to Magna Carta, but only as historical ornament.56

D. Boumediene vs Bush (2008) and the Military Commissions Act

To find serious discussion of the historical foundation of U.S. constitutional rights, one must turn to the U.S. Supreme Court’s handling of the Military Commissions Act, which it addressed in Boumediene vs Bush (2008). The central issue in Boumediene was whether Congress could strip federal courts of habeas corpus jurisdiction for those held at Guantanamo Bay. The Supreme Court ruled that Congress could not do so, but only by the slimmest of margins, dividing 5-4. Both the majority opinion, authored by Justice Anthony Kennedy and one dissent by Justice Antonin Scalia invoked historical narrative as central to their argument. That they chose different methods of historical analysis helps explain their different conclusions.57

Justice Kennedy placed special weight on habeas corpus, which he argued was “central” to the Framers’ conception of the Constitution and had to be taken into due consideration when interpreting the Suspension Clause. Perhaps thanks to the several historians’ briefs which were filed with the Court, Kennedy recounted the history of habeas corpus. “Magna Carta decreed that no man would be imprisoned contrary to the law of the land,” Kennedy began, and he continued by noting that the judicial remedy of habeas corpus developed painstakingly, even “by the centuries-long measure of English constitutional history.”58 In abbreviated fashion, Kennedy ran through the development of habeas corpus from a prerogative writ to one of subjects’ privilege. Along the way, he noted that the general principle of Magna Carta, that the king shall be beneath the law, was an early conclusion reached by the British.

This was not the same narrative laid out by the Founders, or by the generation that first debated the suspension of habeas corpus in 1807. Kennedy’s narrative was informed by modern professional histories written by academics for academics. This was

56 A powerful testament to the embattled nature of Magna Carta is the fact that the New York Times (often called the US’ “newspaper of record”) published an article on Magna Carta’s 800th anniversary essentially dismissing it as a matter of historical curiosity only, and a bad one at that. Tom Ginsburg, Stop Revering Magna Carta, The New York Times, Jun. 14, 2015.

Ginsburg’s article would only be possible thanks to a welter of professional historians’ work on Magna Carta. Their meticulous scholarship has uncovered much that was hidden about the document, and has given us great insight into its meaning. It is ironic that this great increase in our historical knowledge is accompanied by a profound sense of alienation at the public level over the value of this historical knowledge.

57 Regarding the Supreme Court’s relationship with Magna Carta, see Peter Linebaugh, The Magna Carta Manifesto, University of California Press (Berkeley), at 174–175 (2008).

definitively not the kind of history that the Framers read. Kennedy did not really
distinguish the modern narrative from the one deployed by America’s first generation.
Rather, he conflated the two. “This history was known to the Framers,” wrote Kennedy:
“The Framers’ inherent distrust of governmental power was the driving force behind the
constitutional plan that allocated powers among three independent branches.”59 They
singled out the special nature of habeas corpus, he continued, and of the principle that the
government was beneath the law. Habeas corpus was one of the primary means by which
the judiciary could check executive attempts to grab power. Kennedy was, in short,
establishing the judicial branch as the sentin el of individual liberty, even if not
necessarily in the same way that the Founders had.

There was more, of course, to Kennedy’s opinion than the historical positioning of
habeas corpus in Magna Carta and the U.S. Constitution. There was the matter of the
interpretation of the Military Commissions Act, which in fact accorded a number of legal
protections to detainees while denying federal courts any jurisdiction to review their cases.
Chief Justice Roberts’s dissent forcibly raised this point, complaining that the justices in
the majority had misread the statute. He also veered towards a kind of pragmatic reading
of the decision’s outcome:

So who has won? Not the detainees. The Court’s analysis leaves them with only the
prospect of further litigation to determine the content of their new habeas right...Not
Congress, whose attempt to “determine through democratic means — how best” to
balance the security of the American people with the detainees’ liberty interest...has been
unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by
its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not
the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a
greater role than military and intelligence officials in shaping policy for alien enemy
combatants.60

Given Chief Justice Roberts’s intelligence and literary acumen, one almost wonders if
this passage was an exercise in deliberate irony. After all, the point of habeas corpus —
or of any procedural due process — is not to insure uniformly “tangible” (one presumes
this means substantive) benefits, but rather to ensure that everyone receives the same
legal process. The inconveniencing of people in power is not just the consequence; it is
the point of the whole exercise.

Justice Antonin Scalia’s dissent turned to history, albeit in a very different way from
Kennedy’s majority opinion. As the Court’s most pugnacious originalist, Scalia purports
to judge constitutional cases by the strict application of original understanding of
constitutional clauses. True to his word, he provided an analysis of the writ of habeas

59 Id. at 742.
60 Id. at 826.
corpus in 1789, showing that it did not run outside the king’s sovereign territory. As for proof of this, he relied on the Government’s argument that the English writ of habeas corpus did not run in Scotland in the eighteenth century, suggesting that Guantanamo Bay was analogous to Scotland today (with the US being, one presumes, the new England).61 There was a logic to this, to be sure. The Founders would certainly have been familiar with the writ of habeas corpus which, as a common law writ, ran with the jurisdiction of the common law courts. The Framers might have known — certainly those trained in the inns of courts back in London would have known — that the common law courts’ jurisdiction did not run to Scotland. But the Founders were aware that even if the common law courts writs stopped at England’s borders, Parliament’s commands did not. Parliamentary statutes ran the length of the empire, a fact that Americans had come face to face with following the conclusion of the Seven Years’ War in 1763. More to the point, the Framers and the first generation of Americans had noted with alarm that Scotland had been treated as more or less conquered territory by England after the 1745 rebellion there. Regardless what the jurisdictional limits of habeas corpus in the King’s courts in 1787 were, it would be absurd to think that Americans would have felt themselves bound by it. So Scalia’s originalist logic, whatever its internal consistency, loses all force once considered historically.62 Regardless, Scalia was in the minority, and the Supreme Court had in 2008 upheld habeas corpus against the government.

CONCLUSION

If we view these two constitutional moments in American history from a great distance, then they might be said to share a common theme — the vindication of the principle of habeas corpus over executive power. But the dynamics of these two moments are so vastly different that they cannot help but reveal much about the changing distribution of power within the branches of federal government as well as changing attitudes about the nature of individual liberty and the needs of state power. In 1807, the most powerful branch of government was Congress. It was also the site of serious constitutional debate about the scope of national power and the rights of individuals. Such constitutional issues often mingled with policy considerations. In an age where political parties had yet to develop truly national organizations or to worry about strict discipline or even organized opposition, it should surprise no one that deliberative democracy was still a powerful force. By 2006, both policy initiative and political power had clearly shifted to the presidency. This is a generally recognized change in American constitutionalism, whether one dates the changes from World War II, Franklin D. Roosevelt’s New Deal legislation flurry of 1833, or even back to changes wrought by Abraham Lincoln during the American Civil War.

61 Id. at 844–845.
The more interesting change is the role of constitutional interpreter. In 1807, congressmen took quite seriously the idea that their interpretations of the Constitution would be binding as precedents for future generations. Furthermore, not one congressman expressed concern over potential Supreme Court review. More than likely, many believed that congressional suspension of habeas corpus could not even be reviewed by the courts. This helps explain why the debate was punctuated with the kind of deep analysis that many might now expect to see before the courts — an examination of what constituted “rebellion” or “invasion,” and what “the public safety” required. The very act of suspending habeas corpus involved a legal and constitutional discussion about the standard for suspension, its constitutionality, and its finality.

In 2006, things were different. The Military Commissions Act was before Congress because the Supreme Court had challenged presidential authority, not because Congress was independently considering what the public safety required. The Military Commissions Act had not been drafted in Congress, although several influential senators had secured notable revisions to its terms. But at no point did congressmen intimate that they were playing an important part as constitutional interpreters. Congressmen instead spoke openly of what would and would not survive judicial review by the Supreme Court. No congressman in 2006 believed that theirs would be the last word on the matter.

References to Magna Carta cast this last point in sharp relief. In 1807, congressmen invoked Magna Carta as part of a narrative that defined the substance of American political rights. This narrative was public in nature, shared by the political community. It did not demand outcomes — people who shared this historical narrative could disagree about what policy prescriptions it supported — but it did require a certain kind of thinking about the nature of constitutional rights and the effects of policy actions. This kind of historical thinking did lead to some superficial uses of Magna Carta, but was also indicative of a robust understanding of liberty. By 2006, such historical thinking was nonexistent in Congress. Supporters of the Military Commissions Act argued from immediate and present concerns and worried little (if at all) about the implications of their position both in historical or future terms. Even the opponents of the Military Commissions Act lacked an understanding of what were the historical implications of suspension.

Granted, Magna Carta was not completely absent. Journalists and opinion writers recalled it as they attempted to make sense of the place of the Military Commissions Act in American political history. Their analyses were no more or less superficial than their predecessors two centuries previous, but one senses the diminution of Magna Carta’s authority. There is one, notable exception. The Supreme Court took it seriously, and perhaps more importantly gave due consideration to the historical processes that produced substantive definitions of rights. Or at least Justice Anthony Kennedy did in Boumediene vs Bush, establishing the rudiments of an historical understanding of habeas corpus that elevated it within the American constitutional tradition.
History has undergone a powerful transition in the American political imagination. Once the province of a popular culture of democracy in America, historical consciousness is now confined to elite discussions of the Constitution. Nothing reveals this more than references to Magna Carta. In the nineteenth century it was a dominant symbol of liberty, self-government, and accountability, so much so that it was the chosen metaphor with which to help explain contemporary events. By the twenty-first century it was a historical artifact, an ornament. The difference is more than pedantic. For the first generation of Americans, historical thinking put rights into a context that made them understandable only as a function of struggle over time. Magna Carta was for them the evidence of the necessity of checking aggressive executive power and it fit within a larger narrative that largely repeated these themes over time. Such a long view of history has, for better or worse, faded in modern times. America’s contemporary democracy comprehends individual and political rights much more narrowly, and only in reference to their immediate circumstances. The result is a Magna Carta to be taken out from behind the glass and dusted off when necessary. In such an environment, commentators are likely to dismiss the past altogether as completely irrelevant to a world locked in the interminable present.