The Power of Habeas Corpus in America

From the King's Prerogative to the War on Terror

Anthony Gregory

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Foreword by Kevin R. C. Gutzman

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THE POWER OF HABEAS CORPUS IN AMERICA

Despite its mystique as the greatest Anglo-American legal protection, habeas corpus provides a history featuring opportunistic power plays, political hypocrisy, ad hoc jurisprudence, and many failures in effectively securing individual liberty. *The Power of Habeas Corpus in America* tells the story of the writ from medieval England to modern America, crediting the rocky history to the writ's very nature as a government power. The book weighs in on habeas's historical controversies – addressing its origins, the relationship between king and parliament, the U.S. Constitution's Suspension Clause, the writ's role in the power struggle between the federal government and the states, and the proper scope of federal habeas for state prisoners and for wartime detainees from the Civil War and World War II to the War on Terror. The concluding chapters stress the importance of liberty and detention policy in making the writ more than a tool of power. Taken as a whole, the book presents a more nuanced and critical view of the writ's history, showing the dark side of this most revered judicial power.

Anthony Gregory is a Research Fellow for The Independent Institute. His articles have appeared in *The Independent Review* and the *Journal of Libertarian Studies* and have been translated into multiple languages, reprinted in textbooks, and used in college courses on law and political science.

Martial or Military Commission:

Second. That the Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority, or by the sentence of any Court Martial or Military Commission.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty fourth day of September, in the year of our Lord one thousand eight hundred and sixty two, and of the Independence of the United States the 87th.

Abraham Lincoln

By the President:

William H. Seward.

Secretary of State.

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Of course, any errors or lapses in judgment are purely the author's responsibility.

Foreword

Ask any American what his most important right is, and he is apt to mention the freedom of speech, the freedom of the press, or the freedom of religion. Also much esteemed are the right to vote, the right to keep and bear arms, and various aspects of privacy.

Very rare is the person who would respond by saying, "The right not to be arrested and jailed arbitrarily," let alone mention the judicial writ that protects that right: the writ of habeas corpus. Lawyers know it as "the Great Writ," and the myth holds that its availability from time immemorial is the chief reason that Anglophones have long been free.

Anthony Gregory here does the estimable service of showing that the Great Writ was not always what we now understand it to be. He also lays out in excruciating, nay shocking, detail the 150-year trend, accelerating in our day, of reducing the writ's importance.

The story begins in medieval England, with the birth of several forms of writ of habeas corpus. Most readers will be surprised to learn that in the beginning, the writ's purpose was not to protect individuals from unjust detention. Rather, the writ began as an instrument for assertion of some courts' superiority over other courts. Individual Englishmen's claims had little role in that story.

In time, however, the writ was transmogrified into a mechanism for limiting royal power to detain. Eventually, it formed the germ of the American Patriots' writ of habeas corpus.

The U.S. Constitution says in Article I, Section 9, Clause 2 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." Gregory's book demonstrates, among other things, that this provision raises more questions than it answers.

For example, whose writ? No other clause of the Constitution expressly empowers a federal court to issue such a writ. Indeed, the Constitution does not require that there be any federal courts other than the Supreme Court, and suits for writ of

habeas corpus are not among the types of suits over which the Constitution grants the Supreme Court original jurisdiction.

Perhaps the Framers contemplated federal suspension of state writs of habeas corpus. Here we encounter one of the forgotten realities of eighteenth- and nineteenth-century American legal practice: that it was chiefly state courts that issued writs of habeas corpus, even to federal executive officials.

Thus, for example, it was Northern state legislatures that adopted personal liberty laws to interfere with the implementation of arguably unconstitutional due process–denying provisions of the Fugitive Slave Act of 1850. In republican America, habeas corpus was originally a pre-trial mechanism usually employed by state courts. The federal government began asserting habeas corpus power against state authority with Andrew Jackson's Force Bill of 1833. (We should note that the only Senate "nay" vote on that bill came from John Tyler of Virginia, who quit Jackson's Democratic Party immediately thereafter, and who ultimately would earn some liberty-minded scholars' respect as the best president in American history.[1]) This trend accelerated with the Supreme Court's decision *Tarble's Case* in 1871, where the Court through one of its most eminent justices said that state courts could no longer issue writs of habeas corpus to federal officials.

Of course, contemporary interest in the relatively arcane writ of habeas corpus grew mainly out of the policies of the George W. Bush administration in pursuit of its War on Terror. Anthony Gregory's account of the writ's fate in Osama bin Laden's war is by turns infuriating and distressing.

Within days of September 11, 2001, Congress passed an Authorization for the Use of Military Force (AUMF). The AUMF gave a congressional imprimatur to presidential use of force against participants in the September 11 attacks and their aiders and abettors.

Famously, Bush pushed the argument that the president as commander in chief of the armed forces had various foreign policy–making powers not directly related to leading the military in execution of Congress's policies. In time, he also took so liberal an approach to the AUMF as to find in it authority for ignoring statutory provisions saying who could be held, what procedural protections they must be given, where they could be held, and how they could be interrogated in pursuit of the War on Terror.

One of the chief casualties of this general approach was the writ of habeas corpus. Bush's subordinates, like absolutist English Stuart kings of the seventeenth century, repeatedly argued on his behalf that various people did not have a right of access to the writ, and they copied the Stuarts in responding to judicial orders to comply with the writ in certain overseas jails (such as at Guantánamo Bay, Cuba) by moving captives to different overseas jails.

[1] Ivan Eland, *Recarving Rushmore: Ranking the Presidents on Peace, Prosperity, and Liberty* (Oakland, CA: The Independent Institute, 2009).

The roots of conservative contempt for the writ lie in the Warren Court's abuse of habeas corpus, which Gregory describes. Today's lawyers are yesterday's law students who grew up in the law studying the invention of unhistorical "rights" by federal judges in the 1950s, 1960s, and 1970s. Since Richard Nixon's 1968 presidential campaign, distrust of liberal judges has formed a key component in the right's criticism of the modern liberal state. Gregory's account, while not forthrightly critical of Warren Court excesses in this regard, makes clear why they provoked a backlash. So widespread has acceptance of the critique become that triangulating Democratic president Bill Clinton signed the Anti-Terrorism and Effective Death Penalty Act into effect. That legislation seriously abridged Americans' access to the writ.

First state courts lost their power to review federal detention; then federal judges' abuse of the writ led the elected branches to curb federal judges' power to issue the writ; and finally came the War on Terror Executive Branch's contempt for due process and the writ of habeas corpus. Perhaps most disappointing, though hardly surprising, in Gregory's account, is the abject failure of President Barack Obama to live up to his campaign criticisms of the Bush administration in this area.

Gregory concludes the story with a perfectly sensible suggestion: that Americans return to the original understanding of the writ of habeas corpus – which made it a key state check on federal power – and make federal judges' accustomed unwillingness to use the writ against federal officials less significant by abolishing the huge prison complex administered by today's federal government.

He concedes that achieving this goal would require nothing less than changing the American culture generally. If American governments imprison a higher proportion of their fellow citizens than any other government on earth, this is no accident.

Ultimately, politicians in the United States respond to elective pressure. As Pogo said, "We have met the enemy, and he is us." In "the land of the free, and the home of the brave," the flag still waves, but the people's pulse no longer beats in time with the Fathers'.

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Introduction

The Power of the Writ

The conflict between the power to detain and the authority to test detentions through habeas corpus writs has provoked impassioned debate for centuries. Questions have reverberated from England to the United States over who has the authority to suspend the writ's privileges and the very meaning of suspension itself. In our own time, no less than in past generations, jurists and scholars have labored to determine who enjoys the writ's protection, which executive officials must answer to which courts or judges, what defines habeas jurisdiction, and whether its boundaries should shift during emergency. The struggle that began in England's royal court system between judicial scrutiny and executive prerogative continues today in America's war on terror.

There exists a temptation to embrace an oversimplified understanding of these controversies, dividing the literature into two opposing sides. Reflecting on wartime executive detention, some advocate extensive presidential power to classify subjects as "enemy combatants," deprive them of prisoner-of-war privileges as well as the civil protections of criminal suspects, and try them in military commissions or hold them indefinitely without trial. Others defend broad habeas jurisdiction – including, perhaps, in cases of foreign nationals detained abroad – along with other procedural safeguards.

A similarly simple bifurcation presents itself in the debate over federal habeas review of state criminal convictions that arose after the Civil War and has become more contentious ever since. In this debate, there once again appear to be two camps – those who believe the federal courts should exercise relatively broad review powers over state convictions, and those who, in the name of judicial modesty, federalism, or finality, argue for greater deference to state proceedings.

Both the debate over executive detention policy and the debate over federal review of state convictions seemingly feature two identifiable sides: habeas conservatives who stress judicial restraint and habeas liberals who applaud the federal judge's authority to vindicate a prisoner's rights. Yet whether seeking to protect individual liberty or urging judges to abide prudentially to comity and restraint, scholars should

acknowledge the writ's institutional limits arising from its nature as a judicial order. Habeas corpus has a discomforting history – what could be called a dark side of the writ – because of its very essence as a prerogative command. Focusing on this dark side exposes the writ's development as one characterized by politicization, unfulfilled promises, legal technicalities, power struggles, and hypocrisy, as much as a story of liberation and justice.

Most habeas debates feature arguments over precedent. This is complicated by the fact that among current legal practices, habeas corpus stands out with a very long history involving shifting power relations that does not always yield simple answers about appropriate current use. Both habeas liberals and habeas conservatives wave the banner of tradition. Liberals look to the Great Writ's historic role as a flexible, evolving, common-law instrument fashioned by judges in both England and the United States according to the circumstances they faced. If they regard the judicial proceedings lacking on due process grounds or otherwise detect a conspicuous injustice, defenders of broad habeas reach tend to find precedential reasons to argue for review.

In contrast, conservatives argue that the U.S. Constitution and Congress regulate the judiciary and that courts possess limited common law powers over wartime detentions. Looking to criminal convictions, they argue that America's decentralized legal system demands that federal judges respect state institutions. If state proceedings appear legitimate, a convict seems guilty despite flaws in procedure, or the president has detained someone in the name of national security, the courts should defer. Conservatives have precedent to back these arguments. They point to the limits of habeas under English common law, for example, in their opposition to judicial jurisdiction over accused terrorists.[1]

Because of the peculiar way the writ became adopted by the American colonies, recognized in the U.S. Constitution, and modified by Supreme Court decisions, federal statute, and executive claims of power at wartime, historical precedent does not always clearly side with either camp in these controversies.

Defenders of broad habeas reach have plenty of good arguments. Habeas corpus did in fact emerge out of something resembling judicial activism in the United States and Britain. The statutory and even constitutional restrictions on its use must reckon with a counter-history, as habeas corpus is indeed a "writ antecedent to statute . . . throwing its root deep into the genius of our common law."[2] Judges eager to exercise broad habeas jurisdiction always faced conservative limits placed on them by the executive and later by Parliament and Congress, but this tension itself

[1] Supreme Court Justice Antonin Scalia notes in his dissent to *Boumediene v. Bush* that the English writ did not reach to Scotland in the late eighteenth century. Accordingly, the U.S. writ, if it is to follow the traditions of its English antecedent, should not extend to Guantánamo today. 553 U.S. 723, 835, note 3 (2008) (Scalia dissenting). Scotland, however, had its own fully formed, distinct legal system, unlike Guantánamo Bay.

[2] *Williams v. Kaiser*, 323 U.S. 471, 484, note 2 (1945). See Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure Fifth Edition* (Mathew Bender and Company, [1988] 2005), 24.

underscores the very struggle over liberty that habeas controversies have come to symbolize over the centuries. Moreover, when it comes to U.S. presidential power and original intent, the most glaring historical argument against conservatives is almost never raised. Before the late 1850s, *the state courts enjoyed habeas review power over federal detentions.* The advocacy of a wartime detention power unchecked by federal courts ignores the role state courts used to have in checking even military commitments.

Habeas conservatives, on the other hand, contend that the federal courts were not designed to have wide latitude over state court proceedings. In response, some scholars have argued that upon ratification of the Constitution, the federal judiciary already had the authority it has now – and that, by extension, Chief Justice John Marshall wrongly decided *Ex parte Bollman*, which has continued to restrict the Court's role improperly.[3] But many other champions of broad habeas authority see this as wishful thinking. In any event, habeas corpus has indeed always been far more limited than its advocates would like to believe. Executive power in many, if not most, instances escaped the effective constraints of habeas corpus – both in England and in the United States, particularly in wartime. In the Civil War and World War II, U.S. presidents exercised detention powers more constrained than those of modern presidents only if the distinctions turn on narrow legal technicalities. In terms of broader principles, proponents of judicial restraint can point to a whole history of executive supremacy.

Popular confusion among the Great Writ's well-meaning enthusiasts stands as a mainstream manifestation of scholarly imprecision. A bumper sticker from a few years ago reads: "Habeas Corpus: 1215–2006," implying that the Great Writ was alive and well from the Magna Carta all the way until President Bush signed the Military Commissions Act of 2006. Yet habeas corpus is not a clear-cut doctrine that either exists in full force or ceases to exist at all. To the contrary, it was always a weaker remedy than its optimistic supporters admitted. For centuries, its advocates have wished to hearken back to a golden age of habeas corpus that never truly was.

For its many successes in protecting individual liberty, habeas has taken on something of a mythic status throughout Anglo-American history. Sir William Blackstone called its legal establishment "another Magna Carta" and the remedy "efficacious . . . in all manners of illegal confinement."[4] Sir William Holdsworth called it "the most effectual protector of the liberty of the subject that any legal system has ever devised."[5] Alexander Hamilton thought it should be "provided for in the

[3] Eric M. Freedman, "Milestones in Habeas Corpus: Part I. Just Because John Marshall Said It, Doesn't Make It So: *Ex Parte Bollman* and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789," *University of Alabama Law Review*, Vol. 51 (2000), 531–602.

[4] Hertz and Liebman, 22.

[5] Charles E. Wyzanski, Jr., "The Writ of Habeas Corpus," *Annals of the American Academy of Political and Social Science*, Vol. 243, Essential Human Rights (January 1946), 101.

most ample manner" against "arbitrary methods of prosecuting pretended offenses, and arbitrary punishment upon arbitrary convictions."[6] In Sir Henry Neville's *Plato* a character celebrates: "You have made an act here lately about imprisonments; that every person shall have his habeas corpus . . . so that no man, for what occasion soever, can lie in prison above a night, but the cause must be revealed, though there be great cause for the concealing it."[7] Yet habeas relief was often not so effective, immediate, or comprehensive.

Scholars have illustrated habeas's boundaries but most have ignored the inescapable reason for such limits. Habeas stubbornly envelops a paradox: It is a tool known for its service to liberty yet at its core is a governmental power. The Great Writ is famous for ensuring that detentions are legitimate – as "an attack by a person in custody upon the legality of that custody . . . to secure release from illegal custody,"[8] a role that presumably preempts an all-powerful state. Yet the literal meaning of the words is a judicial command. The Latin words translate into, "you [shall] have the body." The forcefulness of this command, directed toward the state's detention power, has garnered admiration from lovers of liberty. Yet it entails an authoritarian element.

Despite its mythic status, the typical habeas process is rather unromantic. A prisoner or detainee petitions for a writ. A judge with the proper authority over the subject, upon receiving the petition, decides whether to issue it. The writ, once issued, goes to the custodian detaining the prisoner, who usually submits a return – a response to the judge justifying the detention. If the judge is satisfied, the procedure typically ends there, the detainee remanded back to the custodian's control. If the judge is unsatisfied, he might order the detainee released, or order the custodian to clarify his reasoning, or choose another course of action. The entire undertaking involves one authority claiming jurisdiction over another, usually in a very formalistic manner. For every vindication of a custodian's power, the authority to detain is upheld. For every undermining of a custodian's power, there is the affirmation of another official's power – a judge's power, to say nothing of the state's general power to decide whom to detain. In this act, judges have often exercised great prerogative of their own.

Because habeas became known as a collateral attack, coming in from the side to scrutinize an ongoing process, that operated when "normal legal remedies were unavailable or inadequate,"[9] the writ has earned a special reputation – almost as

6 Hertz and Liebman, 22.

7 Helen A. Nutting, "The Most Wholesome Law – The Habeas Corpus Act of 1679," *The American Historical Review*, Vol. 65 (April 1960), 542.

8 *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

9 Before the American Revolution, it was a "prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention." According to S. A. DeSmith, it was first called a "prerogative writ" in 1620 by Chief Justice Montague in *Richard Bourn's Case*. William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, CT: Greenwood Press, 1980), 4, 6–7.

though it functions at a level above the rest of the legal system. Yet courts have done their share to limit the reach of habeas and to approve detentions resulting from both questionable criminal convictions and novel exercises of administrative power. For most of U.S. history, petitioners for the writ have not automatically been heard. Habeas corpus has been characterized as a writ of right, not of course. A petitioner's claims must satisfy the judge or court and only then will the writ issue. It is an extraordinary remedy: judges will not hear what they regard as frivolous cases, and may exercise more discretion than that.

The many technicalities that determine habeas's precise use remind us that the device has as much to do with judicial authority and politics as with liberation. In addition to the judge's discretion, habeas corpus is bound by formalities, tradition, and its idiosyncratic origins – a practice developing over seven centuries of patchwork legislation, executive edicts, and judges grabbing power. Habeas's multifaceted and complicated evolution has added to its mythical status, although another result has been a somewhat awkward identity for this supposedly Great Writ. Although most often involved in criminal justice, it is a civil remedy, typically used alongside an appeal or review process, to come in from the side and question an executive detention or criminal conviction in court. Most modern habeas corpus cases in the United States have come to resemble an appeals process. Habeas's non-linear history has rendered it "a civil, appellate, collateral, equitable, common law, and statutory procedure,"[10] thus making everything about it more difficult to delineate.

Although habeas has gained an idealistic mystique, scholars have long been aware that it takes place within imperfect legal systems and orders – all of them inextricably tied to the exercise of power, a fickle instrument in ensuring liberty. Recent literature on habeas corpus implicitly bolsters the case that power deserves a central place in analyzing the writ, but none of it makes the argument directly and accounts for all of habeas history under this unifying framework. Paul D. Halliday's *Habeas Corpus: From England to Empire* is indispensible for documenting Parliament's propensity to imprison, demystifying the Habeas Corpus Act of 1679,[11] and revealing the imperial nature of England's writ, although it provides neither much analysis of the United States nor an overarching lesson about power. Eric M. Freedman's well-researched *Habeas Corpus: Rethinking the Great Writ of Liberty* reminds readers of the radical jurisdictional switch that occurred between states and the federal government, a revolution in power relations that would appear "odd . . . to modern lawyers," yet this is very tangential, if not detrimental, to his thesis.[12] Cary Federman's unique and fascinating *The Body and the State* draws philosophical implications from the writ's connection to power, but appears to find anti-authoritarian meaning in the writ's

[10] Hertz and Liebman, 22.

[11] Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: The Belknap Press of Harvard University Press, 2010).

[12] Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* (New York University Press, 2001), 18.

centralizing tendency without acknowledging fully the ironic affirmation of power that it also implies.[13]

Jonathan Hafetz's *Habeas Corpus After 9/11*, a masterful treatment of executive anti-terror detention policy, devotes a chapter to habeas's limits in retraining the "elusive custodian." Hafetz notes that the writ paradoxically encourages "the state to structure its detention operations to avoid habeas corpus altogether" and can "even legitimize the very abuses that it is meant to prevent by giving illegal executive action a judicial stamp of approval."[14] Yet Hafetz maintains a hopeful tone about the federal court's potential to restrain the executive, perhaps not fully acknowledging the historical impotence of judicial review. Nancy J. King and Joseph L. Hoffman's *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* compellingly reveals the "costly charade" that federal review of state convictions has become.[15] The authors do not, however, attempt to explain today's habeas complications firmly in the context of centuries of power relations, including the writ's nationalization in the nineteenth century.[16] Justin Wert's *Habeas Corpus in America* comes closest to honing in on power, as its thesis concerns habeas corpus as a politically driven institution. Wert argues that the "writ implicates elements of governmental authority, legitimacy, and individual rights that every political regime seeks to reformulate and then enforce, both politically and legally."[17] Yet Wert complicates his thesis, drawing distinctions between eras of Supreme Court deference to the political branches and periods when it defends its own institutional integrity, although both political and institutional forces could more simply be unified under the rubric of power.

Habeas corpus remains the most celebrated of judicial mechanisms in Anglo-American history. In today's debates over wartime detention powers, and in all the contemporary debates over federal review of state detentions, both broad traditional principles and nuances of law and jurisprudence come into play. But habeas corpus presents a much rockier history than one might want to ascribe to such a revered writ. For every individual wrongly detained who gets relief, habeas enthusiasts must cheer. In the main, however, this is not the history of the so-called Great Writ. It originated in service to power and has been used to secure slavery. Its most inspiring episodes were often short-lived, historical aberrations. It has been suspended, usurped, and ignored by hypocrites who tout it one day and reject it the next. For every prisoner protected

[13] Cary Federman, *The Body and the State: Habeas Corpus and American Jurisprudence* (Albany: State University of New York Press, 2006).

[14] Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (New York University Press, 2011), 191, 203.

[15] Nancy J. King and Joseph L. Hoffman, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Writ* (Chicago: University of Chicago Press, 2011).

[16] For example, the authors barely discuss state habeas review of federal convictions before *Tarble's Case*, deferring to the Supreme Court's jurisprudence (King and Hoffman, 175, note 31).

[17] Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence: Kansas University Press, 2011), 3.