

Summer 2002

The Bush Military Tribunals: Where Have We Been? Where Are We Going?

Eric M. Freedman

Maurice A. Deane School of Law at Hofstra University

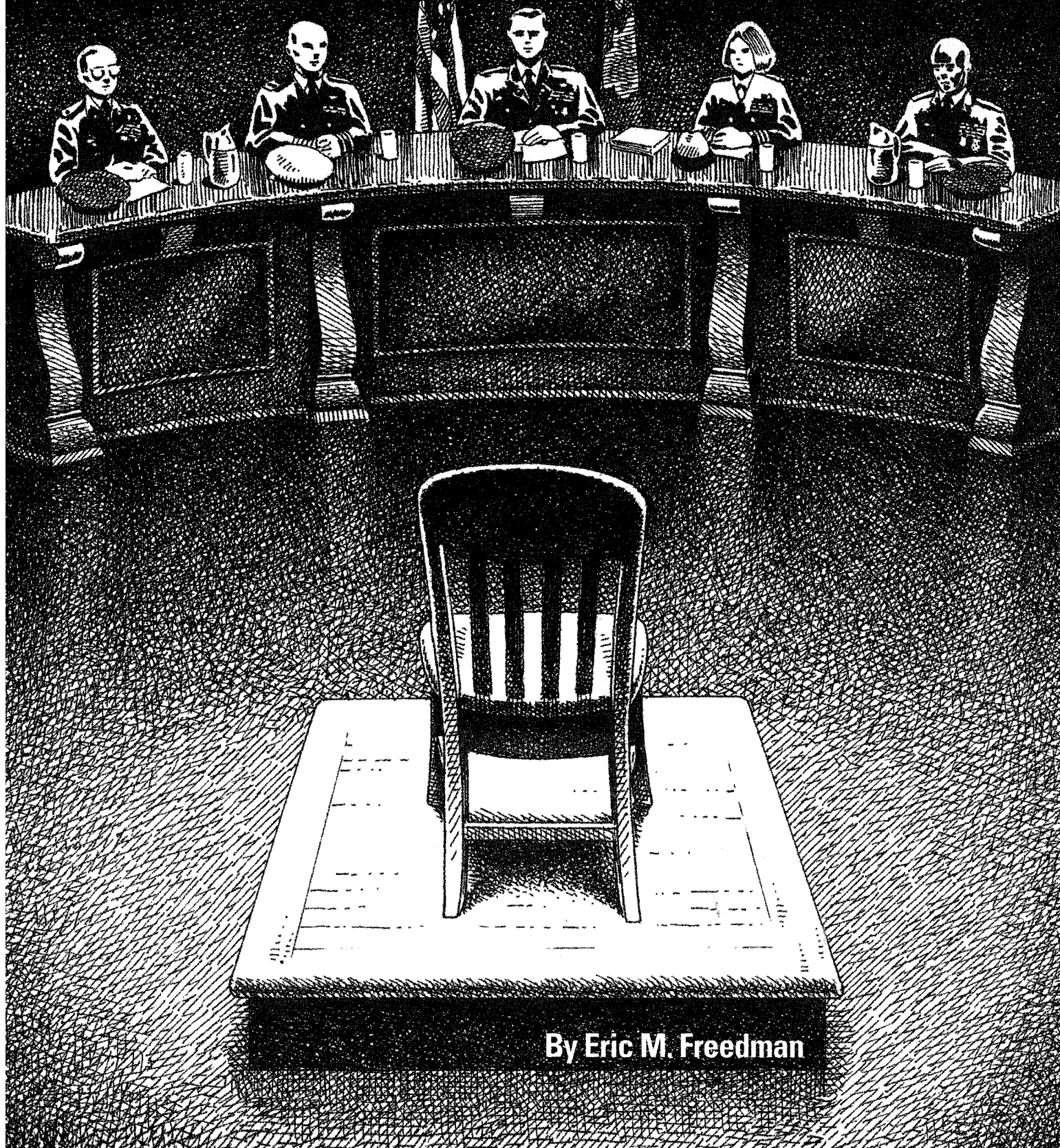
Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?*, 17 Crim. Just. 14 (2002)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/54

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

The Bush Military Tribunals: Where Have We Been? Where Are We Going?



By Eric M. Freedman

From the Civil War onwards, the American legal system has taken actions in answer to perceived national threats that we now condemn as inconsistent with core constitutional values. These include the suppression of free speech during World War I and the Palmer Raids that followed, the internment of Japanese-American citizens during World War II, and the persecution of Communists during the 1950s. Each time we have vowed not to repeat the error.

In this context the issue of the current administration's proposed military tribunals raises issues of law and policy that should concern everyone who values our constitutional structure. If we respond no better than before when confronted with the same challenge, we are guilty of hypocrisy today and weaken our justice system for tomorrow. Fortunately, we have the legal and historical knowledge needed to improve upon the past. The question is not one of intellectual resources, but of political will.

The order: legal Swiss cheese

On November 13, 2001, President George W. Bush issued the military order "Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism." One of its provisions authorizes the trial by military commission of any noncitizen as to whom the president determines "that there is reason to believe that such individual . . . has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy." It pronounced that "military tribunals shall have exclusive jurisdiction with respect to offenses by" such individuals, who "shall not be privileged to seek any remedy . . . in any court of the United States."

Although a few commentators initially supported the president's action, fuller analysis showed it to be riddled with legal flaws. (See, e.g., Association of the Bar of the City of New York, *Inter Armes Silent Leges: In Times of Armed Conflict, Should the Laws Be Silent?* (2002) (available at www.abcnny.org).)

It is uncontroversial that the armed conflict that followed America's incursion into Afghanistan was, legally, a war; the hostilities were between organized military forces representing the incumbent governments of internationally recognized states. Under the Geneva Conventions, the Taliban combatants detained by the United States in Afghanistan

are prisoners of war and subject to trial at our hands only for (a) war crimes, or (b) while in captivity, for ordinary crimes, but only if given the same process as would one of our soldiers. Tardily and grudgingly, our government has now recognized these elementary principles.

The purpose of the order—and its danger to the rule of law—is that it seeks to extend this battlefield justice system to persons who would otherwise be entitled to the protections of the civilian justice system. The order's key predicate is that the United States is engaged in a war not just against the forces of the now-unseated government of Afghanistan, but also against the al-Qaeda organization. Although the U.S. government refuses to give prisoner-of-war status to al-Qaeda's captured members, two key propositions follow. First, al-Qaeda members may be detained until the end of hostilities. Second, its operatives are guilty of war crimes when they commit acts of terrorism. And, as all agree, war crimes may be prosecuted before military tribunals.

However attractive politically, these are very questionable legal propositions. Al-Qaeda is not a state nor are its agents soldiers, any more than are those of the Colombian drug cartel. The "war against terrorism" is not one likely to have a defined and documented conclusion. (See Katharine Q. Seelye, *Rumsfeld Backs Plan to Hold Captives Even if Acquitted*, N.Y. TIMES, March 29, 2002, at A18 (secretary of defense suggests "that prisoners could be held indefinitely, not just until the end of the war in Afghanistan, but until the end of the war on terrorism—which could take years"; says determination will be made by president).) If, as Bush administration spokesmen have suggested, the laws of war need to be modernized to deal with current conditions, the changes should be made through a reasoned process, and, in any event, could not be applied ex post facto.

Appropriately, the Supreme Court has specifically held that if the president chooses to use the military to enforce federal law this does not turn the resulting conflict into a "war" for constitutional law purposes. (The *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).) Nor does it suspend our international law obligations to provide due process to aliens. (See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2002) (outlining provisions of international law transgressed by order).)

Yet among its many other violations of fundamental standards of domestic and international law (see International Covenant on Civil and Political Rights, Arts. 14, 15(I), 999 U.N.T.S. 171 (Dec. 9, 1966)) the order:

1.) did not limit the authority of military tribunals to war crimes nor to areas where the civilian courts were not functioning (*But see Ex Parte Milligan*, 71 U.S. 2, 120–26 (1866));

2.) permitted the commissions to render judgment on the

Eric M. Freedman is a professor of constitutional law and legal history at Hofstra University School of Law. He is the author of *Habeas Corpus: Rethinking the Great Writ of Liberty* (NYU Press, 2001), which discusses the *Bollman* case at length.

basis of "such evidence as would," in the opinion of a majority of its members, "have probative value to a reasonable person." (*But see Richmond v. Rogers*, 365 U.S. 540-41 (1961) (prohibition against use of involuntary statements is "not because such statements are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law");

3.) placed no limits on the permissible length of pretrial detention (*Cf. Miranda v. Arizona*, 384 U.S. 436, 446 (1963) (detailing abuses practiced during pretrial confinement)) and left the final decision as to the disposition of each prisoner in the standardless and unreviewable discretion of the president or the secretary of defense; and

4.) gave the latter official control over the selection of defense counsel and over access to the proceedings. (*But see Richmond Newspapers v. Virginia*, 488 U.S. 555, 580 & n.17 (1980); Association of the Bar of the City of New York, *The Press and the Public's First Amendment Right to Terrorism on Trial: A Position Paper* (2001) (available at www.abcny.org.)

A political shot in the foot

More broadly, as ABA Criminal Justice Section chair Ronald C. Smith pointed out in the Winter 2002 issue of this magazine, conducting such trials before military tribunals, even if legal, would be tragically misguided public policy. We should seek a path, as Edmund Burke said in discussing the American Revolution, defined not by "what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do."

If we are indeed at war, what values are we fighting for? Are we now announcing that when the chips are really down due process is simply an unaffordable luxury that unacceptably retards reaching a predetermined result? In that case, why should an ordinary citizen of an Arab country whose government takes the same view believe that its justice system is any worse than ours? To abandon our core values in times of stress is to confess that we lack confidence in them.

If we abdicate in this way the long-term negative effects will far outweigh any short-term benefits. Such a desertion under fire both assists the propaganda efforts of our adversaries, which—whatever our own views of the truth—have already been shockingly successful worldwide, and weakens fledgling democracies whose development furthers our interests as well as our ideals. "Progressive Arab states, like Jordan, Morocco, and Bahrain, which want to build their

legitimacy not on how they confront Israel but on how well they prepare their people for the future, are being impeded. And retrograde Arab regimes, like Syria, Saudi Arabia, or Iraq, can now feed their people more excuses why not to reform." (Thomas L. Friedman, *The Hidden Victims*, N.Y. TIMES, May 1, 2002, at A25.)

Yet inflicting these wounds upon ourselves is as unnecessary as it is counterproductive. In recent years the government has successfully prosecuted, through ordinary criminal trials in federal district court, the 1993 World Trade Center bombers, those who attacked our embassies in Africa, and those who conspired to blow up a series of public targets in New York City. In each instance, an independent jury, a skeptical press, and a vigorous defense team at trial and on appeal to a neutral judiciary showed our system working at its best.

If the government lacks confidence that its evidence is probative enough to meet constitutional standards, it should not be prosecuting at all. In flatly refusing in recent months to extradite suspects who might face military tribunals here, such allies as Spain and Germany have pointedly reminded us why that is so. Due process protections are not simply impediments to getting the guilty punished; they are designed in the first instance to determine with accuracy who is, in fact, guilty of what.

Edwin Meese once famously said that the concept of an innocent suspect is "contradictory" because "if a person is innocent of a crime, then he is not a suspect." (*See Howard Kurtz, Meese Says Few Suspects Are Innocent of Crime*, WASH. POST., Oct. 11, 1985, at A6.) But the rest of us might think it prudent to safeguard against the possibility that when the Marines snatched someone off a foggy plateau in Afghanistan they apprehended the eponymous cousin of the person actually on their list (passing entirely the question of how the person made it onto the list in the first place).

Even when the rules of due process are fully in place, our system makes mistakes. Ask Dr. Wen Ho Lee, the scientist wrongly accused of spying in 1999 at the Los Alamos National Laboratory. Ask any of the 100 innocent people who have been released from Death Row over the last 25 years. Then ask the secretary of state (who in more ordinary times is to be found complaining about the abysmal standards of other countries' justice systems) how he plans to explain the execution of a foreign national that turns out to have been wrongful.

Nor should those of us lucky enough to be American citizens succumb to the comfortable delusion that we need have no concern with being subjected to this result-oriented

If we are at war,
what values are we
fighting for?

process. Although the Bush order applies only to aliens (including the many millions of taxpaying, law-abiding, and productive legal aliens), that limitation is a purely self-imposed one. Even if it remains in place through this crisis (as the administration assures us that it will), there is no legal reason why it need exist in the next one. If the use of military tribunals is constitutional in these circumstances, then it is constitutional as to American citizens as well (see *Ex Parte Quirin*, 317 U.S. 1, 37–38 (1942) and any legal or practical precedents that are established now will apply accordingly.

So too, permitting the government today to exercise wartime powers to fight al-Qaeda will make it all the more difficult tomorrow to forbid it from using the same powers against radical environmental groups, violent anti-abortion activists, or right-wing militias.

Perhaps under the impact of similar commentary (and, no doubt, after belatedly seeking the advice of competent internal counsel), once it had issued the order the Bush administration showed little inclination to actually convene a military tribunal. Moreover, the tribunal regulations that the government eventually published (Department of Defense, Military Commission Order No. 1, March 21, 2002) seemed to ameliorate some of the key constitutional concerns (e.g., by providing that a not guilty finding could not be changed to guilty on administrative review (Sec. 6(H)(2)). But there are at least three reasons why lawyers concerned with the functioning of the criminal justice system should not drift off into complacency.

First, significant deficiencies persist, including those named in points numbered 1–3 above, in contravention of both domestic and international law (see Amnesty International, *Memorandum to the US Government of the Rights of People in US Custody in Afghanistan and Guantanamo Bay*, April 2002, at 39–62). Notably, the regulations still deny independent judicial review of convictions or sentences. Indeed, the administration remains unwilling to have any legal issues at all adjudicated by an ordinary court system, whether civilian or military, and clearly contemplates that all decisions will ultimately be at the discretion of the president.

Second, commentators who have praised the regulations may not have read far enough through them. Section 7(B) provides: “In the event of any inconsistency between the President’s Military Order and this Order, . . . the provisions of the President’s Military Order shall govern.” This could render the putative improvements made by the regulations

(e.g., providing for a unanimous rather than two-thirds vote for a death sentence) illusory. To be sure, it is also possible that these improvements are supplements to, rather than repudiations of, the order and hence binding on the government (see, e.g., *U.S. v. Nixon*, 418 U.S. 683, 695–96 (1974)). But as long as the right to answer to such questions remains with the executive branch itself, some of the central provisions of the regulations may turn out to be ones “that palter with us in a double sense, that keep the word of promise to our ear, and break it to our hope.” (WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 8).

Third, in apparent frustration at being unable to meet even its own modest standards for bringing charges against

the vast majority of the individuals it has in detention, the government has begun floating ideas for even more questionable actions, such as basing convictions on membership in al-Qaeda, independent of the person’s connection to any particular act. (See Neil A. Lewis, *U.S.*

Weights New Doctrine for

Tribunals, N.Y. TIMES, April 24, 2002, at A1.) Legally, this attempt to rely upon constitutional law developed in the context of the Smith Act prosecutions of Communists that began in the 1950s (e.g., *Scales v. U.S.*, 367 U.S. 203 (1961)) is highly dubious in light of subsequent developments (e.g., *Brandenburg v. Ohio*, 393 U.S. 444 (1969)). But that does not seem to be a particularly weighty factor in the government’s decision making. Hence, lawyers who cherish constitutional values must remain alert to see that they are preserved.

Congress and the courts

One persisting theme in the chorus of criticism of the order was that the administration acted without congressional involvement, creating a series of avoidable legal and political problems. And it is predictable that there will, at some point, be additional congressional hearings on the entire subject.

This prospect raises both opportunities and dangers. On the positive side, if military tribunals are to be used at all, Congress can and should enact the very useful set of due process guarantees—including Supreme Court review—that the ABA House of Delegates overwhelmingly called for at its Midyear Meeting in Philadelphia. (Res. 8C; see *Bar Group Defies Administration in Voting for Limits on Tribunals*, N.Y. TIMES, Feb. 5, 2002, at A12.)

But Congress cannot always be trusted to act wisely. That body is as likely to seek to restrict as to expand the rights of suspected terrorists. If it does, the judicial system

Congress should
enact due process
guarantees.

may need to rethink a basic constitutional limit on legislative power.

***Bollman*: a loaded weapon**

The Suspension Clause of the Constitution provides: “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.” (U.S. CONST. art. I, § 9, cl. 2.)

This provision reflects the fact that when the country was founded habeas corpus was universally known and celebrated as the “Great Writ of Liberty”; during the ratification debates Federalists and anti-Federalists alike vied to praise it.

The reason is straightforward. The availability of habeas corpus means that if an individual is found to have been unlawfully imprisoned the court can release him or her—enforcing the rule of law and frustrating governmental oppression. Attempts to extend the range and efficacy of the writ, thus, have been for centuries inseparable from attempts to secure justice for those who find themselves execrated by the dominant forces in society—for example, those who are alleged to have some connection to some activity that the government considers supportive of “terrorism.”

In light of this background, everyone agrees that a statute explicitly providing that a particular class of prisoners shall not have access to habeas corpus is a suspension whose legitimacy is subject to judicial testing. (As for the president, he or she has no right at all to suspend the writ, which is why the White House counsel now agrees that detainees under the order will have access to judicial review— notwithstanding that the order purports to deny access to “any remedy . . . in any court of the United States” and that the regulations do not address the issue.) (Cf. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27. (“The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission’s jurisdiction through a habeas corpus proceeding in a federal court”).)

The difficulty arises when Congress has been silent or has created some new form of detention (e.g., a hypothetical “terrorism hold” on the say-so of the U.S. attorney general) and, in the same legislation, denied detainees access to judicial review. In such circumstances it could be argued

that since no writ was available in the first place, Congress had not suspended it.

Given the importance that all of the Framers placed upon the Great Writ, and the fact that English courts had the inherent power to issue it unless Parliament had passed an affirmative act of suspension, this would seem to be a weak argument indeed. Rather, “since the writ was not constitutionally granted in positive terms in many state constitutions, and [was] only recognized indirectly by a limitation placed upon the authority to suspend its operations,” the Framers naturally assumed “that the non-suspension clause also functioned in oblique fashion, implicitly conferring the right of the privilege.” (Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, FREEDOM AND REFORM, 55, 76–77 (Harold M. Hyman & Leonard W. Levy eds., 1967).)

These propositions should be (and among scholars are) uncontroversial; but courts and lawyers must confront John Marshall’s opinion in *Ex Parte Bollman*, 8 U.S. (4 Cranch)

75 (1807). That case involved some of the alleged coconspirators in what the government charged was a plot by Aaron Burr to separate western regions of the United States from their allegiance to the republic. Like Burr, Marshall was politically hostile to

The president
has no right to
suspend the writ.

President Thomas Jefferson. But the president’s Republican party controlled both houses of Congress. So Marshall was in a risky position. Releasing the defendants would certainly upset the other branches, and might lead to some sort of retaliation against the Court. Indeed, less than two years had passed since Burr himself had presided over the Senate impeachment trial of Justice Samuel Chase. And although that had resulted in an acquittal, the justices had certainly heard the message.

Deciding *Ex Parte Bollman* in this context, Marshall moved carefully. His ruling released the prisoners, but added the superfluous observation that the Court had no inherent authority to grant the writ; it could only exercise the habeas powers Congress may have supplied.

But suppose that Congress had done nothing to provide the courts with authority to grant the writ? Marshall’s view was that in that case the prisoners would have had no judicial recourse. What then of the Suspension Clause? That provision, according to Marshall, was merely an exhortation to Congress to make statutory provision for the writ.

Fortunately, he continued in a flattering passage of dicta, Congress had heeded the call in the case before him. “Acting under the immediate influence of this injunction,”

the first Congress, "must have felt with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." (*Bollman*, *supra*, 8 U.S. at 95.)

This obiter was not only gratuitous, but deeply flawed. (See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 36–41 (NYU Press, 2001).)

Marshall himself had written just a few years before that there was universal agreement that "on adopting the existing constitution of the United States the common and statute law of each state

remained as before & that the principles of the common law of the state would apply themselves to magistrates of the general as well as to magistrates of the particular government." (Letter from John Marshall to St. George Tucker (Nov. 27, 1800) in 6 THE PAPERS OF JOHN MARSHALL 23 (Charles F. Hobson ed., 1990).) Thus, the Framers

expected that even if Congress were to fail to enact statutory habeas corpus provisions, the federal courts would have common law or state law powers to issue the writ.

As *Bollman*'s counsel argued, adducing a powerful array of historical and legal authority, "the power of issuing writs of habeas corpus, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen." (*Bollman*, *supra*, 8 U.S. at 79.)

For many years, however, no case emerged in which it was necessary for the Court to reexamine Marshall's hortatory view of the nature of the writ. So it lay to hand as a dangerous weapon that might potentially be employed against disfavored groups.

St. Cyr: a fortunate misfire

In reforming the immigration laws in 1996, Congress sought to use the weapon. The statute revising the provisions for the confinement of aliens contained a section headed "Review by Habeas Corpus Precluded," and tried to create a new class of prisoners who, by the law creating their status, would not have access to judicial review of their detentions.

Facing a challenge to this enactment last Term in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), the Court found itself in a delicate situation. Under *Bollman*'s view, the congressional action would seem to be legitimate. But that could hardly

be correct under the Constitution. The Suspension Clause was designed to constrain Congress, so an interpretation putting Congress in complete control of the writ would make scant sense. Rather, the appropriate rule would be the one Marshall had rejected: that the Court had inherent power to issue the writ unless and until Congress suspended it, in which case the legislative action would be subject to judicial review in normal course.

Confronted with this dilemma, the Court ducked, and—construing the statute so as to avoid constitutional doubt—read the statutory provision "Review by Habeas Corpus Precluded" as not precluding habeas corpus review. The

Court held that because Congress had, in fact, provided the writ, there was no need to rule on whether its failure to do so would constitute a suspension.

Answering that grave question, the Court declared, should await another occasion. And in response to Justice Scalia's outraged protestation that *Bollman* had already resolved the issue, the

Putting Congress
in complete control
of the writ makes
scant sense.

majority blandly misquoted Marshall. Thus, the Court on that day managed to get the Constitution right, although Marshall wrong. Although this was certainly better than Justice Scalia's outcome, which got Marshall right but the Constitution wrong, the state of affairs is not just unstable but potentially dangerous to constitutional liberty. (See Freedman, *supra*, at 3–4).

Indeed, in a decision a few days after *St. Cyr*, the Court noted that it was not dealing with the specific problems that might be posed in the context of the detention of alleged terrorists, thus postponing a decision of precisely the issue that might arise under a future statute (see *Zadvydas v. Davis*, 121 S. Ct. 2491, 2502 (2001)).

The role of lawyers

The first and best defense against regressive congressional legislation is for concerned individuals and groups to take every opportunity to drive home to our representatives the message that due process is not optional, nor are its advocates apologists for terrorism.

To be sure, we have an attorney general who chillingly says to those who raise civil liberties concerns: "My message is this: your tactics aid only terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends." But that is all the more reason for our legislators, so often the beneficiaries of the protections afforded by our justice system, to be leaders in pointing out that the preser-

vation of those safeguards is a powerful weapon against our enemies and an inspiration to our friends.

Is it unrealistic to expect this from our representatives? Consider the words of Senator Robert Taft (R-Ohio) in a speech during the depths of World War II.

As a matter of general principle, I believe there can be no doubt that criticism in time of war is essential to the maintenance of any kind of democratic government. . . . [T]oo many people desire to suppress criticism simply because they think it will give some comfort to the enemy to know that there is such criticism. If that comfort makes the enemy feel better for a few moments, they are welcome to it as far as I am concerned because the maintenance of the right of criticism in the long run will do the country maintaining it a great deal more good than it will do the enemy, and will prevent mistakes which might otherwise occur.

(2 THE PAPERS OF ROBERT A. TAFT 303 (Clarence E. Wunderlin ed., 1997).)

Still, Congress is not a body renowned for its political courage. If it chooses to follow the policy it announced

with respect to habeas corpus for illegal immigrants in 1996, then lawyers must urge courts at every level to repudiate John Marshall's politically inspired *Bollman* dicta that invented the hortatory theory of the Suspension Clause.

Only in this way can the judicial branch play its rightful role as a check on potential governmental abuses of power and be true to what Justice Brennan once rightly described as "the root principle" of habeas corpus: "[T]hat in a civilized society, government must always be accountable to the judiciary for a man's imprisonment." (*Fay v. Noia*, 372 U.S. 391, 402 (1963).)

Conclusion

Every one of us, whether or not a government official, should take to heart the words of Benjamin Franklin, "There is not in any volume, the sacred writings excepted, a passage to be found better worth the veneration of freemen than this: 'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty or safety.'" ■





THE FOURTH ANNUAL NATIONAL CONFERENCE ON SCIENCE AND THE LAW

EMERGING TRENDS: SCIENTIFIC EVIDENCE IN THE COURTROOM



October 3-5, 2002

Biscayne Bay Marriott Hotel  Miami, Florida

Sponsored by:

-  American Bar Association, Criminal Justice Section
-  National Institute of Justice, U.S. Department of Justice
-  American Academy of Forensic Sciences
-  National Center for State Courts

In collaboration with:

-  The National Academies
-  The American Association for the Advancement of Science

For information, visit the website www.nijpcs.org/upcoming.htm

