

BOOK REVIEW: *THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR*

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Anthony Gregory: *The Power of Habeas Corpus in America: From the King's Prerogative to the War on Terror*. New York: Cambridge University Press, 2012. ISBN: 978-1-107-03643-7, 420 pages.

READING ANTHONY GREGORY'S MASSIVE TOME on the development of habeas corpus from fourteenth century England through its incorporation into Common Law, and then into Article One of the US Constitution and finally, down to the Patriot Act and other more recent modifications of the "great writ," I am reminded of something that I heard as a graduate student many decades ago, when I asked a professor about reading a particularly demanding book. I was urged to plunge into that text, providing I could spare a few months. Unlike the book I asked about then, which was a total waste of time (as I soon discovered), Gregory's study is a monument to meticulous research. Indeed, the last regular chapter "The Modern Detention State and the Future of the Writ" is followed by long appendices running from World War Two detention cases down to the partial suspensions of

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habeas corpus during the Bush II presidency. One gets the impression the author was so much immersed in his material that he couldn't leave it even after three hundred pages.

For anyone who toils through this densely written book, it is hard to miss Gregory's main point, which is made with particular force in the last two chapters. Although according to one of his sources the writ has been "a dramatically effective instrument for holding government power in check," Gregory shows how often such praise belies the reality. In the best case scenario, habeas corpus has lived up to the grateful appraisal of boxer Rubin "Hurricane" Carter, who was rescued from a questionable first degree murder charge after being imprisoned without sufficient evidence and without a real court hearing. For Carter, "the Writ of Habeas Corpus is not just a piece of paper, not just a quaint Latin phrase. It was the key to my freedom." Gregory provides other testimony to the value of the writ, which was clearly established in Common Law and then brought to the infant American Republic by its constitutional architects who had been schooled in British law. It is prominently on display, or so it would seem, in the Constitution's Article One, Section 9, and Clause 2. There, as every college student in constitutional law finds out, the principle of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Despite its place in the Constitution and its earlier appearance in Common Law, habeas corpus, as Gregory proves, has just as often advanced the power of the state as protected the individual against arbitrary arrest and incarceration. In the US, the state and federal government, especially during the Civil War and its aftermath, have contended for power by enacting or suspending habeas corpus, in accordance with their interests. During the Second World War, the federal government displayed no reservations about detaining suspected enemy collaborators, including a multitude of Japanese Americans who were placed in detention camps because of their ethnic origin. The Supreme Court at the time ended up deferring to the federal government's decision to relocate Japanese Americans, on the grounds of war necessity. This was the Court's position in *Korematsu v. United States* in 1944, a case that came on petition from an American citizen of Japanese ancestry who had been stripped of his property and civil liberties.

Curiously, two figures who were closely identified with the civil rights revolution in the postwar period, Earle Warren and Felix Frankfurter, played critical roles in this unusual treatment of Japanese Americans. As governor of California, Warren took the initiative in rounding up and detaining Japanese Americans in his state. Frankfurter, who brought around other judges into supporting key civil rights cases in the 1950s, produced the boldest

justification for sweeping executive power in assessing the Korematsu case. According to Frankfurter: “The provisions of the constitution which confer on the Congress and the President the powers to enable the country to wage war are as much part of the Constitution as provisions looking to a nation at peace. The validity of the action under the war power must be judged wholly in the context of war. The action is not to be stigmatized as lawless because like action in time of peace would be lawless.”

Gregory perceives no real limit for Frankfurter as to what the American government should be allowed to do in the name of military necessity. Gregory also underlines the conflict between Frankfurter’s jurisprudence and what the Framers defined as war powers. The American founders understood the “violations of liberty that the British Empire conducted in the name of war and national security. Indeed with the lone exception of the Third Amendment, the Bill of Rights makes no exemption for wartime, implying that the Framers had no intention to have most of the remaining constitutional restrictions on government power only stand strong during peace.”

As a historian I would only add two details to Gregory’s learned treatment of the wartime detention cases. First, the conventional textbook accounts of Warren and Frankfurter typically skip over their dubious records in upholding civil liberties in the early 1940s. That may be because most journalists and academic historians consider World War Two to be “the good war,” and aren’t bothered by its massive violations of the rights of American citizens. Making the situation even worse is the inseparability of today’s conservative establishment from the liberal international ideology incarnated by the Bush II administration. Given the sweeping powers that the federal government claimed in the name of ‘fighting terror,’ Frankfurter would have perfectly represented the views of the last Republican administration.

Second, the fact that habeas corpus was used as a way to enhance state power should cause no surprise to students of modern European history. The German legal theorist Carl Schmitt provides the reason for this development with his aphorism: “He is the sovereign who decides the case of the exception.” The evolution of habeas corpus in the US has coincided with the federal government’s morphing into an exceedingly strong sovereign state. Whatever the Framers may have originally intended, it was natural that habeas corpus be invoked to strengthen, not weaken, the authority of a growing American national state.

Moreover, the American Constitution treats habeas corpus in the context of a suspension clause. Need we ask who would be empowered to decide the “case of the exception” when a possible suspension came under

consideration? In a battle between the states and a federal government that came to monopolize military force, do we have to ask which side would use habeas corpus or its suspension more effectively as an instrument of its authority? The treatment of habeas corpus in Common Law and in the Constitution would not substantially limit the progress of the modern state. This is not a glitch but a function of power.